110-27

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1139.

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD COMPANY AND THE IOWA RAILROAD LAND COMPANY, PLAINTIFF IN ERROR,

vs.

HANNAH JEWELL, DORA JEWELL, AND ZELLA JEWELL, HEIRS OF ANDERSON JEWELL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 13, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1139.

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD COMPANY, and THE IOWA RAILROAD LAND COMPANY.
Plaintiffs in Error,

vs.

ANDERSON JEWELL.
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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SUPREME COURT OF IOWA.

Hon. JAMES G. DAY, Chief Justice.

Hon. JAMES H. ROTHROCK,
Hon. JOSEPH M. BECK,
Hon. AUSTIN ADAMS,
Hon. WILLIAM H. SEEVERS. } Justices.

G. B. PRAY, Clerk.

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD COMPANY, and THE IOWA RAILROAD LAND COMPANY,
Appellants,

vs.

ANDERSON JEWELL.

Be it remembered that heretofore, to-wit, on the 15th day of August, 1882, there was filed in the office of the clerk of the Supreme Court of Iowa, the abstract of appellants, the same being in the words and figures following, to-wit:

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD COMPANY, and THE IOWA RAILROAD LAND COMPANY,
Appellants,

vs.

ANDERSON JEWELL.
Appellee. } In Equity.

E. S. BAILEY and JOY & WRIGHT,
Attorneys for Appellants.

JOHN S. MONK, J. E. SELLICK & PLATT SMITH,
Attorneys for Appellee.

ABSTRACT OF RECORD.

On the 9th day of January, 1877, the Cedar Rapids

and Missouri River R. R. filed in the Monona County, Iowa, District Court their

PETITION

in said cause, setting out its cause of action as follows:

1. That the said C. R. & Mo. R. R. R. is a corporation duly organized and doing business under the laws of the State of Iowa.

2. That petitioner is the owner of and entitled to the present possession of the following described land in Monona County, Iowa: The southeast quarter of the southwest quarter of section twenty-eight, tp. eighty-three, north of range forty-five, west of 5th p. m.

3 That the defendant wrongfully withholds the possession of said premises from your petitioner and claims the legal paramount title thereto.

4. And your petitioner further shows that Congress, by an act approved May 15, 1856, entitled "An act making a grant of land to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State," granted to the State of Iowa, to aid in the construction of a railroad from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the 42d parallel, across the State of Iowa to the Missouri River, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road. It was also further enacted in the same act, that in case it should appear when the said line of road should be definitely fixed, that the United States had disposed of the land so granted, or any part thereof, then it would be lawful for any agent appointed by the Governor of the State of Iowa, to select, subject to the ap-

proval of the Secretary of the Interior, other lands in alternate sections, designated by odd numbers and within fifteen miles of the line of said railroad, an amount equal to those so disposed of by the United States.

5. The General Assembly of the State of Iowa, by an act approved July 14, 1856, entitled "An act to accept the grant and to carry into execution the trust conferred upon the State of Iowa in alternate sections, to aid in the construction of railroads in said State," approved May 15, 1856, granted the lands mentioned in the 4th paragraph hereof to the Iowa Central Air Line Railroad Company, upon certain conditions contained in said act.

6. The said Iowa Central Air Line Railroad Company, after passage of the act last above mentioned, made a survey and location of said line of railroad, and caused a map thereof to be made and filed as required by the said act of Congress; and the said line was so surveyed and staked out and definitely located along and upon the surface of land through the county of Monona and past the land mentioned in the second paragraph of this petition, on the 23d day of March A. D. 1857, and thereupon the limits of said grant became and were definitely fixed and located.

7. The said Iowa Central Air Line R. R. Co. having failed to construct the said railroad according to the provisions of the act referred to in the 5th paragraph above, the State of Iowa, by act of the General Assembly of said state approved March 17, 1860, entitled "An act to resume the rights conferred upon the Iowa Central Air Line R. R. Company by an act approved July 14, 1856, and to repeal certain law in relation thereto," resumed the title to said land; and by another act approved March 16, 1860, entitled "an act to carry into

execution the trust conferred upon the state in respect to lands by an act of Congress approved May 15, 1856, to aid in the construction of a railroad from Lyons City across the state of Iowa and near the 42d parallel to the Missouri River," granted to your petitioner all and so much of the lands, rights, interests powers, as had been or might thereafter be conferred upon the state of Iowa, by the act of Congress of May 15, 1856, aforesaid, to aid in the construction of a railroad from Lyons City, hereinbefore mentioned, which grant was duly accepted by petitioner (C. R. & Mo. R. R. R..)

8. That at the time of the location of the Iowa Central Air Line Railroad as hereinbefore stated, a large amount of the lands in sections designated by odd numbers within six miles of said railroad, as located, had been sold or otherwise disposed of by the United States. That after the location of said road, and in the year 1856, the Governor of Iowa appointed one Bernhart Hann. an agent, as provided in act of Congress approved May 15, 1856, to select other lands from those undisposed of in sections designated by odd numbers between the six and fifteen mile limits mentianed in said act of congress, in lieu of those previously disposed of within thesix mile limits.

That said agent, in pursuance of said appointment and by authority of said act of Congress, selected all the vacant and unappropriated lands in sections designated by odd numbers between the six and the fifteen mile limits of said railroad, which lands so selected, together with those within the six mile limits, were insufficient to make a full and complete grant of six sections to the mile, as contemplated by said act of Congress.

That in 1857 the Secretary of the Interior approved

said selections and certified said lands, both those selected and those within the six mile limits, to the State of Iowa.

9. Petitioner further shows that it being found, as hereinbefore stated, that the lands so selected and granted were insufficient to make a full and complete grant of six sections to the mile, petitioner, by an act of Congress approved June 2, 1864, entitled "An act to amend an act entitled 'An Act making a grant of land to the state of Iowa in alternate sections, to aid in the construction of certain railroads in said state, approved May 15, 1856,"' was authorized to modify and change the then uncompleted line of the said road, and it was therein enacted and provided that the Secretary of the Interior should certify and cause to be conveyed to petitioner, as the work progressed along the main line of its road, out of any public lands belonging to the United States at the time of said grant, not then sold, reserved or otherwise disposed of, or to which a pre-emption right or right of homestead settlement had not then attached, and on which a *bona fide* settlement and improvement had not been made under color of title from the United States, or from the state of Iowa, within fifteen miles of the original main line, an amount equal to that originally authorized to be granted to aid in the construction of said road by the act of Congress approved May 15, 1856, hereinbefore referred to.

10. That said grant immediately attached to all the public lands within the fifteen miles of the original line of survey and included in that tract of land described in the second paragraph of this petition. That the plaintiff located the modified line of the road as provided in said act of June 2, 1864, on or before June 17, 1865, and completed its line of road to the Missouri

River on the 2d day of July, 1867. That in order to make an amount of land equal to that intended to be granted by the act of Congress approved May 15, 1856, it required not only the lands certified as stated in the 8th paragraph of this petition, but in addition thereto all the public lands within the fifteen miles of the original line of said road held by the United States on the 2d day of June, 1864, including the land claimed by plaintiff in this action. That upon the completion of said road the plaintiff became the absolute owner of said land to which its right had attached from and related back to June 2, 1864, and the United States held the legal title in trust for petitioner, and it became and was the duty of the Secretary of the Interior to certify and convey the said lands to your petitioner, which he has failed to do.

11. Petitioner further shows that by reason of some mistake or of some fraudulent representation made by the defendant, the character of which is unknown to the plaintiff, on the 7th day of July, A. D. 1871, said tract of land was wrongfully and unlawfully patented to the

nt by the United States, and he now holds the
tle in trust for the plaintiff. That the owner-
petitionor in said land has all times been para-
and superior to that of defendant, and that when
ıer's right to said land attached, said defendant
right, claim or interest of any kind or nature in
id land.

itioner prays that its right, interest and owner-
and to said premises may be adjudged and held
ant and superior to the claim and title of defen-
That said defendant may be held and adjudged
said land in trust for petitioner; that he may,
e of the court be ordered and required to make,

execute and deliver to petitioner a conveyance of said tract of land and that hereafter plaintiff may be held to have and hold the full and complete legal title to said land. That defendant be forever and perpetually enjoined and restrained from having or asserting any title to or control over or possession of said land, and that plaintiff may have a writ of possession of said land and such other and further relief as may be just and equitable, and costs.

(Petitions duly verified). (Tr. pp. 2--38).

On the 31st day of March, 1877, the defendant in said cause filed his

ANSWER

in said case, being in substance as follows:

1. Defendant admits the due organization of plaintiff as pleaded in 1st paragraph of petition.

2. Denies that plaintiff is owner of land described in 2d paragraph or any part thereof, and says that said land belongs to defendant in fee simple.

3. Denies the wrongful withholding of the possession of the land, as alleged in the 3d paragraph, but admits himself in possession and claims the paramount title thereto.

4. Defendant admits on information the passage of the act of May 15, 1856, as stated in 4th paragraph, and that said stated odd numbered sections were selected, but whether in accordance with law or not he does not know.

5. Defendant is informed and believes that the act of July, 1856, was passed as stated, and that the lands were conferred upon the Iowa Central Air Line R. R. Co. as therein set forth.

6. Defendant supposes the facts set forth in the 6th paragraph of petition to be true.

7. Defendant supposes, from information, that the facts set forth in the 7th paragraph of petition are true.

8. That the facts set forth in 8th paragraph of the petition are probably true.

9. That the facts set forth in the 9th paragraph of the petition are probably true.

10. Defendant is informed that the plaintiffs located their modified line and built their road to the Missouri River but has no knowledge or information sufficient to form a belief as to the exact time or circumstances in relation to said grant, nor as to the consturction or effect of the same, nor can the defendant state when said road was completed. He thinks it might have been some time in the year before stated. Defendant protests that he is unable to form an opinion as to the effect of the act of June 2, 1864. Defendant says that he believes the plaintiffs were not the owners of the land stated in the petition, and he is not aware of the exact duties of the Secretary of the Interior, or whether he neglected his duties or not. The defendant is not aware that he was ever trustee for the plaintiff, and therefore denies the same.

11. Defendant says, for further answer, that the cause of action did not accrue at any time within five years next before the commencement of this suit.

12. Defendant says that he obtained his patent in the usual way, and denies all fraud and mistake in the manner of procuring the same. That the defendant has been continuously in possession of said premises for more than ten years next before the commencemen of this suit, claiming the same as this defendant supposed by a good and lawful title, procured from the United States. That this possession has been continuous, open, notorious and adverse; that defendant has made valu-

able improvements on said premises, has paid taxes thereon, and has never heard or been informed of any adverse claimant until the commencement of this suit; that this defendant claims to be an innocent purchaser for a valuable consideration actually paid therefor, and reposed on that title in confidence and expended large sums of money in making such valuable improvements with the actual acquiescence and encouragement of plaintiffs, who neither claimed nor pretended to have any claims to the premises, but who claimed other lands elsewhere as the lands belonging to their grant; that they paid taxes, as the defendant is informed, on those lands, and advertised themselves to the world as the owners of those lands; that the defendant was led to believe by the conduct of plaintiffs and the officers having charge of the land department of the Government, that the lands taken by defendant were Government lands and open to settlement. And the defendant submits that it would be inequitable to grant the relief prayed for in plaintiffs' petition.

12 (a). Defendant further says that the land in controversy comprises a part of about 50,000 acres of uncertified lands now held and occupied by *bona fide* settlers under homestead, pre-emption, and private entry, and claimed by the plaintiff as indemnity lands under the grant mentioned in the petition. The plaintiffs well knowing that none of said land had ever been certified to them by the Secretary of the Interior, or reserved from sale by such Secretary, and with full knowledge that the same were kept in market by the proper officer of the United States Land office, and subject to homestead, pre-emption and private entry, and such entries were being made in good faith from day to day to *bona fide* settlers, and that such settlers were be-

stowing their labor and expending large sums of money in improving said lands and erecting homes thereon, and paying large sums of money as taxes on said lands, and while the plaintiffs have been diligent in their efforts to dispose of such indemnity and other lands as have been certified to them under the same grants and which were selected in the same localities of the same character as the lands in controversy; and kept the taxes paid on such certified lands, they have never offered to pay any taxes and assessments on the uncertified lands aforesaid or exercised any acts of ownership over them or taken any steps to have them certified to plaintiffs, or done any act or thing to make it known that they had any claim, right title, or interest therein. But on the contrary, when they made their selection of indemnity lands under the grants aforesaid, they omitted to select any of the 50,000 acres before mentioned, and omitted all of such lands from the lists sent by them to the Secretary of the Interior for certification, thereby inducing said Secretary of the Interior to believe their grant was filled without any of the lands remaining uncertified and to keep them on the market subject to entry as aforesaid. That plaintiffs, from the time of the passage of the act of 1864, under which they claim title to the land in controversy, to the time of the commencement of this action, by their acts and conduct, as aforesaid, have proclaimed to the world that they had no claim to the uncertified lands aforesaid. That defendant and those under whom he claims by the acts and conduct of the plaintiffs, were led to believe that the land in the petition described was government land, subject to entry as aforesaid, and that acting on that belief the said lands were, on the 6th day of February, 1865, at the United States land office in the district in

which the same were situated, entered in good faith by defendant and defendant and those under whom he claims have complied with all the laws of the United States and regulations of the land department in such cases made and provided, and have made valuable improvements upon said premises to the amount of two thousand dollars, and have paid all the taxes and assessments levied upon said premises, and defendant avers that plaintiffs are now stopped from asserting any claim or interest in or to the same.

(Answer duly verified). (Tr. pp. 50-118).

At the appearance term a motion was made to try said cause on written evidence. Motion sustained and it was so ordered. (Tr. pp. 42-48).

On the 26th day of May, 1877, the plaintiff, the C. R. and Mo. River R. R. filed a

REPLY

to defendant's answer, in substance as follows:

Plaintiffs, for reply to the affirmative allegations in paragraphs 12 and 12 (a) of defendant's answer, aver that 10 years have not elapsed since plaintiff's right of action herein accrued and since plaintiffs have been entitled to the possession of said land.

For further reply, denies that plaintiff never claimed said land and that defendants made any improvements thereon with the acquiescence and encouragement of plaintiff, and denies that defendant was led to believe by the conduct of plaintiff that the plaintiff made no claim thereto, and that said land was open to settlement. Denies that plaintiffs have asserted no claim to said lands and made no effort to have the same certified to them, but aver that the said lands were selected and claimed by said plaintiffs as land inuring to them under the said grant as in said petition alleged, and have made

repeated efforts to have the same certified to them, and that the entry thereof under which the defendants claim title was allowed by the land department over the objections and protests of plaintiffs herein.

Plaintiff further avers that said lands were wrongfully kept in market and entries thereof allowed over the objections and protests of the plaintiff herein. And plaintiff further says of the truth of the other affirmative allegations in paragraphs 12 and 12 (a) and paragraph 11 of defendant's answer, it has neither knowledge or information sufficient to form a belief.

(Reply duly verified). (Tr. pp. 122--130).

On the 19th day of November, 1877, the defendants filed in said causes

AMENDMENT

to their answer, in substance as follows:

Defendant, for amendment to answer hereinbefore filed, for the purpose of conforming the pleading to the proof, in addition to the affirmative allegations therein contained, says:

1. Denies that all lands in sections designated by even numbers within fifteen miles of said original main line, not sold or otherwise disposed of by the Government at the time of the passage of act of Congress of June 2, 1864, under which plaintiff claims were required or necessary to make the amount authorized by the act of May 15, 1856, to be granted, or the amount per mile by said last mentioned act intended to be granted, and particularly denies that the land in controversy was or is required or necessary for that purpose. And defendant alleges that plaintiff has already had certified to it more lands than was authorized or intended to be granted by either or both of said acts of Congress.

2. Defendant avers that said act of Congress of

June 2, 1864, did not attach to any particular tract of land until it was selected by the plaintiff and reserved, certified and conveyed to it by the Secretary of the Interior, and that the land in controversy was never selected, certified, reserved or conveyed under said grants and that said grants never attached thereto.

3. Defendant avers that the grant of 1864, under which plaintiff claims was for the modified line,—that the modification of the uncompleted portion of plaintiff's railroad was permitted by said act on condition that plaintiff should, within a reasonable time, build the branch road to some point in Monona county in or at Onawa City. And that on the 21st day of April, 1876, the plaintiff having failed to comply with said condition, and the Government having, by reason thereof, a reversionary interest in the land granted by said act of June 2, 1864, Congress, by the act approved April 21, 1876, entitled "An act to confirm homestead and pre-emption entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the land department," the entry and title of the said defendant to said premises has been ratified, established, confirmed, and declared to be valid.

Further answering, defendant avers that in September, 1869, plaintiff quit-claimed all its right, title and interest in and to the lands in Monona county it had then received or might thereafter receive under said grants, and that plaintiff has no further right or interest in or to any lands granted thereby.

That the homestead entry of defendant was made on the 6th day of February, 1865.

On the 24th day of November, 1877, said plaintiff filed

which in substance is as follows:

1. Denies that any condition was attached to the modification of plaintiff's line of road as averred in the 3d paragraph of said amendment. Denies that plaintiff has failed to comply with any of the conditions of said grant. Denies that the act of Congress of April 21, 1876, had any application to, or in any manner affected the claims or interests of the parties to this action in or to said land, and says that the right of plaintiff to said land had fully vested before the time of said act.

2. Denies that defendant is an innocent purchaser in good faith of said land, and avers that said defendant had notice, by the several acts of Congress, of the General Assembly, and the orders of the Secretary of the Interior, of the Commissioners of the General Land Office, and by the location of the line of road, and otherwise, of plaintiff's claim and right in and to said land.

3. Plaintiff denies that it has in fact conveyed said land to any person whatever, and avers

That the Iowa Railroad Land Company was organized for the purpose, among other things, of purchasing, taking holding, and disposing of such lands as plaintiff should receive under said several acts of Congress.

That plaintiff executed and delivered to said company a deed, or deeds, whereby it purported to convey to said company all the lands in said Monona county it should thereafter acquire.

That while said company had an equity, its legal rights and title, attached only after the legal title should be acquired by plaintiff, and as to the uncertified lands, including the land in dispute, was intended only as a declaration of trust and agreement to convey.

That by an understanding between plaintiff and said company, not in writing, plaintiff was to procure the legal title to said lands, and in pursuance of such understanding this action was commenced with the full knowledge and consent of said Land Company.

(Reply duly verified). (Tr. pp. 181--189).

On the 24th day of Nov. 1877, the C. R. & Mo. R. R. R. and the Iowa R. R. Land Company filed

AMENDMENT TO PETITION.

as follows:

Now comes the plaintiff, and by leave of court first obtained, files this amendment to the petition and makes the Iowa Railroad Land Company upon its application a plaintiff herein, and avers:

That the Cedar Rapids and Missouri River Railroad Company, in the year 1869, by, deed, conveyed all the lands it then owned in Monona County, Iowa, to the Iowa Railroad Company, and undertook to convey all the lands which it might acquire as enuring to it under the said grant of 1856, and the amendatory act of 1864. That under the said conveyance the legal title to the land thereafter acquired by the Cedar Rapids and Missouri River Railroad Company enured to the benefit of the Iowa Railroad Land Company. That by virtue of an oral agreement and understandiug made between the said parties, the Cedar Rapids and Missouri River Railroad Company is to acquire the title to the lands accruing to it under the said grants of Congress, and after the title is acquired to convey the same by proper descriptions to the Iowa Railroad Land Company. That by reason of the said deed or conveyance, the Iowa Railroad Land Company acquired an interest in the land in suit, and is therefore joined as plaintiff herein.

(Amendment to petition duly verified.) Tr. pp. 175–180.)

And defendant filed answerto said amendment to petition as follows:

Denies that any oral agreement was made between Iowa Railroad Land Company and its co-plaintiff, as in said amendment alleged, and defendant makes the same answer and defense to the allegations and pretended claims of each of said plaintiff's as is made to the allegations and pretended claims of the C. R. and Mo. R. R. R. in its original answer and amendments thereto, to which reference is hereby made and the said answer and amendment thereto is hereby made a part thereof.

(Tr. pp. 191–200.)

And said cause came on for hearing in vacation by agreement of parties thereto that the said cause should be heard in vacation, and the judgment therein be entered at the September Term, 1882, of the District Court of Menona county, Iowa.

And it was further stipulated in writing that the testimony introduced by either party in the case of C. R. & M. R. R. R. and Iowa Railroad Land Company vs. Benjamin Herring et al in the Monona county District court and the same stipulations as to the testimony in said cause should be introduced and used in this case, together with such other testimony as either party might introduce in said cause.

And the plaintiff's to sustain the issues on their part introduced the following testimony:

PLAINTIFF'S TESTIMONY.

Plaintiffs offer in evidence the act of Congress approved May 15, 1856, making a grant of Land to the State of Iowa to aid construction of certain railroads in said state, viz.:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That there be, and is hereby, granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River; from the city of Davenport via Iowa City and Fort Des Moines to Council Bluffs; from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the 42d parallel across the said state to the Missouri River; from the city of Dubuque to a point on the Missouri River near Sioux City, with a branch from the mouth of the *Tete Des Morts* to the nearest point on said road, to be completed as soon as the main road is completed to that point, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads. But in case it shall appear that the United States have, when the line and routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said state, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States, nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold and [to] which pre-emption rights have attached as aforesaid, together with the sections, and parts of sections, designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of

Iowa for the use and purpose aforesaid; *Provided*, That the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads: *Provided further*, That the land hereby granted for and on account of said roads severally shall be exclusively applied in the construction of that road for and on account of which lands are hereby granted and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And provided further*, That any and all lands heretofore reserved to the United States, by any Act of Congress, or in other manner by competent authority for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which, by such grant, shall remain to the United States within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same shall have been first offered at public sale at the increased price.

SEC. 2. *And be it further enacted*, That the said lands hereby granted to the said state shall be subject to the disposal of the legislature thereof for the purpose aforesaid and no other; and the said railroads shall be and remain public highways for the use of the

Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States.

SEC. 4. *And be it further enacted,* That the lands hereby granted to said state shall be disposed of by said state only in the manner following; that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said state shall certify to the Secretary of the Interior that any twenty miles continuous miles of any of said roads is completed, than another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of said roads, may be sold, and so from time to time until said roads are completed; and if any of said roads are not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

SEC. 5. *And be it further enacted,* that the United States mail shall be transported over said roads, under the direction of the Postoffice Department at such prices as Congress may by law direct: *Provided,* That until such price is fixed by law the Postmaster General shall have power to determine the same.

Approved May 15, 1856." (Tr. pp. 236–232.)

And plaintiff introduced the act of the General Assembly of the state of Iowa, approved July 14, 1856, viz.:

"*An Act to accept of the grant and carry into execution the trust conferred upon the State of Iowa, by an act of Congress entitled 'An Act making a grant of lands to the*

State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15, 1856.

SEC. 1. *Be it enacted by the General Assembly of the State of Iowa*, That the lands, rights, powers and privileges, granted to and conferred upon the state of Iowa, by an act of Congress entitled 'An act making a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of railroads in said state,' approved May 15, 1856, be and the same are hereby accepted upon the terms, conditions and restrictions contained in said act of Congress.

SEC. 2. That so much of the lands, interests, rights, powers and privileges, as are or may be granted and conferred, in pursuance of the act of Congress aforesaid to aid in the construction of a railroad from Burlington on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River, are hereby disposed of, granted and conferred upon the Burlington and Missouri River Railroad Company, a body corporate created and existing under the laws of the State of Iowa.

SEC. 3. That so much of the lands, interests, rights, powers and privileges, as are or may be granted and conferred, in pursuance of the act of Congress aforesaid to aid in the construction of a railroad from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line railroad, near Maquoketa, thence on said main line, running as near as practicable to the 42d parallel, across the said state to the Missouri River, are hereby disposed of, granted and conferred to and upon the Iowa Central Air Line Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

SEC. 5. That so much of the land, interests, rights, powers and privileges, as are or may be granted and

conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri River at or near Sioux City, with a branch from the mouth of the *Tete Des Morts* to the nearest point on the said road, to be completed as soon as the main line is completed to that point, are hereby disposed of, granted and conferred to and upon the Dubuque and Pacific Railroad Company, a body corporate, created and existing under the laws of Iowa.

SEC. 6. The lines and routes of the several roads above described shall be definitely fixed and located on or before the 1st day of April, next after the passage of this act, and maps or plats showing such lines and routes shall be filed in the office of the Governor of the State of Iowa. It shall be the duty of the Governor, after affixing his official signature, to file such map in the department having the control of the public lands in Washington; such location being considered final only so far as to fix the limits and boundary in which lands may be selected; and if it shall appear that the lands that have been donated by the act of Congress aforesaid, for the construction of the several lines above indicated, cannot be obtained within the limits and along any part of the lines aforesaid, the Governor shall from time to time appoint agents to make such selections as may be authorized or granted by Congress for the lines aforesaid; but the compensation of such agents and the costs, expenses and charges attendant upon and occasioned by making such selections, shall be fixed, regulated, paid and borne by each of said railroad companies, respectively, upon and for its own line.

SEC. 7. The Iowa Central Air Line Railroad Company shall furnish, equip and operate the branch of their

railroad that will be constructed under the grant from Lyons City to the point of intersection with the main line of their road near Maquoketa, in the same manner with their line from the west as completely as though the same was a continuation of said main line, and shall never give any preference to the main line of said road, or any part thereof; as defined in their articles of incorporation, by business arrangements, tariff of prices or otherwise, over the said branch of their railroad.

SEC. 8. The grants aforesaid are made to each of said companies, respectively, upon the express condition that in case either of said railroad companies shall fail to have completed and equipped 75 miles of the road within three years from the 1st day of December next, 30 miles in addition in each year thereafter, for five years, and the remainder of their whole line of road in one year thereafter, or on the 1st day of December, A. D. 1865, then and in that case it shall be competent for the state of Iowa to resume all rights conferred by this act upon the company so failing, and to resume all rights to lands hereby granted and remaining undisposed of by the company so failing to have the length of road completed in manner and time as aforesaid.

SEC. 9. The roads aforesaid shall be constructed upon a gauge with a width of four feet eight and one-half inches, and the iron used in the track shall be of approved quality and pattern, and the said roads shall be completed and furnished in a style and of a quality equal to the average of other first-class western roads, and when the roads, or any of them, authorized to be constructed by this act shall be intersected by the roads of any other railroad company now constructed, or to be hereafter constructed, it shall be the duty of such road or roads receiving the benefit of this act to

furnish all proper and reasonable facilities and to join such other company in making all necessary crossings, turnouts, sidelings and switches, and other conveniences necessary for the transportation of all freight and passengers over either or any road or roads hereby mutually accommodated, whether said passengers or freight are brought by the roads benefitted by this act, or any other road or roads now constructed, or which may hereafter be constructed, and at such rates as shall not in any case exceed the regular tariff or charges on such road or roads.

SEC. 10. All persons who at the time of said grant was made, held valid claims by actual occupation and improvement upon any of the lands embraced in said grant, shall be protected in the same and entitled to purchase and enter the same upon the terms and conditions hereinafter provided.

SEC. 11. Any person wishing to avail himself of the provisions of this act, shall, within three months after the passage thereof, file his application for that purpose with the Judge of the county where such lands may be situate, and shall prove to the satisfaction of the said Judge that his claim is valid, and that the same existed at the time said grant was made; and upon such proof being made, such Judge shall give to the applicant a certificate of the fact, and such certificate shall entitle the holder or *bona fide* asssignee to enter such land at the rate of $2.50 per acre: *Provided*, That no person, claimant, or the assignee of a claim, shall be entitled to more than one hundred and sixty acres of land under this act: *And provided further*, That the person asserting a claim, whether as claimant or assignee, shall file his affidavit that he has not, either directly or indirectly, received the benefit of the provisions of this act.

Before any rights shall be acquired under such certificate a copy of the same together with the evidence shall be served upon the secretary of the company interested, and such company shall have the right to appeal from the decision of such Judge to the district court in the same manner as appeals are taken from the decisions of justices of the peace, at any time within ninety days after the service of such papers, and the same shall be tried as other appeal cases, and an appeal may be taken to the supreme court by either party, in the same manner as appeals in other cases.

SEC. 12. Such certificate, on being filed with the secretary of the company on whose line of road such lands may be situate, when no appeal has been taken as provided, shall entitle the holder or assignee to the possession of said land, until the title shall become vested in the company; upon payment thereafter to the treasurer of the company for said land at the price above designated, such person shall receive from the secretary of said company a patent to such land, not exceeding in quantity 160 acres. Such deed or patent shall vest in the purchaser all the title of said company in and to such lands, except so far as to reserve to the company all such right-of-way and station grounds as may be actually necessary for the use of the company.

SEC. 13. The said companies shall each severally assent to and accept the provisions of this act, by a written instrument under the seal of such corporation, with the signature of the proper officer within 90 days after the passage of this act, which said acceptance shall be filed in the office of the Secretary of State, and be by the secretary recorded in the books kept by him for recording of articles of association.

SEC. 14. Said railroad companies, accepting the

provisions of this act, shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the General assembly of Iowa, not inconsistent with the provisions of this act, and the act of Congress making the grant.

SEC. 15. It shall be the duty of the companies receiving the benefit of this act, to make a regular annual report of their proceedings at the usual time and place of electing their officers, exhibiting a detailed statement as far as practicable, of the amount of their expenditures, liabilities, &c., a copy of which shall be filed in the office of the Secretary of State.

SEC. 16. *Be it further enacted*, That any of said companies accepting the grant of lands under this act shall take the same with the conditions imposed and incumbrances specified in this act, and shall in no event have any claim or recourse whatever upon the state of Iowa for a misapplication of said grant, incumbrances or conditions in this act imposed.

SEC. 17. This act shall take effect and be in force from and after its publication in the Iowa Capital Reporter and Iowa City Republican.

Approved July 14, 1856."

"I certify that the foregoing was published in the Iowa Capital Reporter and Iowa City Republican on the 16th day of July, 1856.

GEO. W. McCLEARY,
Secretary of State."

(Tr. pp. 233-243).

And the plaintiff introduced the act of the General Assembly of the state of Iowa, approved March 17, 1860, viz:

"*An Act to resume all rights conferred upon the Iowa Central Air Line Railroad Company by an act approved July 14, 1856, and to repeal certain laws in relation thereto.*

WHEREAS, By the act of Congress approved May 15, 1856, there were granted to the state of Iowa certain lands to aid in the construction of certain railroads in said state, upon certain terms, conditions and restrictions, under which said lands might be disposed of: and,

WHEREAS, The General Assembly of the state of Iowa, by an act approved July 14, 1856, accepted said grant of lands upon the terms, conditions and restrictions contained in said act of Congress, and contracted with the Iowa Central Air Line Railroad Company for the sale, upon certain terms, of that portion of said lands granted by said act of Congress to aid in the construction of a railroad from Lyons City, northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the 42d parallel, across the said state to the Missouri River; in consideration of the understanding on the part of said company, and subject to the conditions and restrictions contained in said act and the act of Congress aforesaid, and,

WHEREAS, The said Iowa Central Air Line Railroad Company has wholly failed to perform on their part, the conditions of said acts, and has utterly failed to construct any part of said railroad as required by law, and by the terms of their contract; and has failed to complete and equip any portion of said road, thereby, at the option of said state, annulling all their rights to the lands and privileges, under and by virtue of said acts

by reason whereof the state of Iowa has the right to resume all said rights and privileges, and all the rights in relation to said lands so as aforesaid conferred upon said company by said state; and,

WHEREAS, No part of said lands have been actually conveyed by this state to said company, nor by said company disposed of pursuant to the provisions of said acts, and inasmuch as the interest of the State in said lands and the construction of the road to aid which said lands were granted by Congress, and as also the good faith of the state in executing the trust conferred to it by Congress, require that the state should resume said rights and privileges and all rights to the land aforesaid; now, therefore,

Be it enacted by the General Assembly of the State of Iowa, That all rights to the lands, interest, rights, powers and privileges, heretofore conferred or intended to be upon the Iowa Central Air Line Railroad Company by an act approved July 14, 1856, entitled "An Act to accept of the grant and carry into execution the trust conferred upon the state of Iowa by an act of Congress entitled 'An Act making a grant of lands to the state of Iowa in alternate sections to aid in the construction of certain railroads in said state,' approved May 15, 1856,' be, and the same are hereby, absolutely and entirely resumed by the state.

SEC. 2. The 4th section of said act approved July 14, 1856, and all other acts and parts of acts inconsistant with this act are hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the Daily Iowa State Register and Daily Iowa State Journal, published at the city of Des Moines.'

Approved March 17, 1860.

"I hereby certify that the foregoing act was published in the Daily Iowa State Register March 21, 1860, and in the Daily Iowa State Journal March 22, 1860.

"ELIJAH SELLS,

"*Secretary of State.*"

(Tr. pp. 245–248.)

And the plaintiff introduced in evidence the act of the General Assembly of the State of Iowa approved March 26, 1860, viz.:

An Act to carry into execution the trust conferred upon the State of Iowa, in respect to the lands granted by an act of Congress approved May 15, 1856, to aid in the construction of a railroad from Lyons City, across the state of Iowa, and near the 42d parallel to the Missouri River.

SECTION 1. *Be it enacted by the General Assembly of the state of Iowa,* That so much of the lands, interests, rights, powers and privileges, as have been or may be granted and conferred in pursuance of the act of Congress, entitled "An Act making a grant of land to the state of Iowa, in alternate sections, to aid in the construction of railroads in said state," approved May 15, 1856, to aid in the construction of a railroad from Lyons City, northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the 42d parallel across the state of Iowa to the Missouri river, are hereby disposed of, granted and conferred to and upon the Cedar Rapids and Missouri River Railroad Company, a body corporate, created and existing under the laws of the state of Iowa: *Provided,* however, that no portion of the grants of land provided for in this act shall be applied in the liquidation of any debt or obligation heretofore made or con-

tracted by the said Cedar Rapids and Missouri River R. R. Co., or ofthe Chicago, Iowa and Nebraska R. R. Co.: *Prodided further*, That it is hereby declared to be the true aim, intent and meaning of this act that the state of Iowa, according to the conditions herein specified — conveys and grants to the Cedar Rapids and Missouri River R. R. Co. her right, title to, and interest in, the aforesaid lands, and nothing more; and in no event shall said company have any claim or recourse against the state for any defect in the title or conveyance of said lands.

"SEC. 2. The grant by this act conferred upon said company is made upon the express condition that in case said company shall fail to have completed and equipped forty miles of its road along the route aforesaid, and west from some convenient point on the Cedar River, near the 42d parallel, within one year from the 1st day of December next, after the passage of this act, thirty miles in addition, each year thereafter, for two years and the remainder of their whole line of road in two years thereafter, or by the 1st day of December, 1865, then and in that case it shall be competent for the state of Iowa to resume all rights conferred by this act upon said company so failing, and to resume all rights to the lands hereby granted and remaining undisposed of to the company so failing to have the length of road completed in manner and time as aforesaid.

"SEC. 3. The provisions of the ninth, tenth, eleventh twelfth, thirteenth, fourteenth and fifteenth sections of the first chapter of the laws of Iowa, passed at the extra session of the Fifth General Assembly, and approved July 14, 1856, so far as the same are applicable to this company under the provisions of this act, and the one hundred and eighty-second chaptdr of the laws of this

state, enacted by the Sixth General Assembly, and approved January 28, 1857; and the eighty-fifth chapter of the laws of this state, enacted by the Seventh General Assembly, and approved March 20, 1858, so far as said enactments are no inconsistent with the provisions of this act, be and the same are hereby made applicable to this company, re-ceiving the benefits of the grant hereby conferred; and it is further provided, that said railroad shall be and remain a public highway for the use of the government of the United States, free from toll or other charges upon transportation of any property or troops of the United States; and if the said company shall accept this grant upon the conditionsaforesaid, which acceptance shall appear by an express writing, under the seal of said corporation, with the signatures of its president and secretary, and shall be filed in the office of the Secretary of the State of Iowa, within ninty days after the approval of this act by the Governor. It shall take the same with the conditions imposed and incumbrances specified in this act; and shall in no event have any claim or recourse whatever upon the state of Iowa, for a misapplication of said grant, incumbrances or conditions in this act imposed.

"SEC. 4. It is hereby further provided, that said Cedar Rapids and Missouri River Railroad Company shall be entitled to the full amount of land authorized by said act of Congress, as the work progresses, for the first three sections of road, of twenty miles each, which shall be constructed by said company; but thereafter as the work progresses, they shall be entitled to an equal pro rata apportionment of the land remaining subject to appropriation in aid of this work, to be ascertained by a division of the quantity of lands so remaining by the number of whole sections of twenty miles each ex-

tending from the point of construction then reached to the Missouri river.

"SEC. 5. It is further expressly provided, that this act shall not be so construed as to give title to any portion of said lands to the company accepting the provisions hereof, otherwise than as the work progresses, and as provided in the act of Congress aforesaid, conferring the lands upon the state of Iowa, namely: When they shall have completed each section of twenty miles of road aforesaid, they shall be entitled to the amount of land apportioned thereto, and not before; and they shall not become entitled to the first one hundred and twenty sections authorized by act of Congress, until such first section of their road shall have been completed, at which time they shall become entitled to the first apportionment of land. Nor shall this act be so construed as in any manner to prevent the General Assembly of this state from resuming, upon failure of either of the conditions named in the second section of this act, all lands to which the said company shall not have then become entitled by completion of one or more sections, as aforesaid, of said road.

SEC. 6. And it is further expressly provided, that said company shall build or cause to be built, before the 1st day of January, 1861, a railroad of like gauge and equal in quality to the Chicago, Iowa and Nebraska Railroad, from Pearl street, in Lyons City to a point of intersection with the Chicago, Iowa and Nebraska Railroad, within the corporate limits of Clinton City, with such switches and side tracks as the business of said town of Lyons may require; and to operate or cause to be operated the same by running passenger and freight cars of the same class with those used by the Chicago, Iowa and Nebraska Railroad, in close connection

forever with all regular trains at any time run on the said Chicago, Iowa and Nebraska Railroad, without occasioning any unnecessary delay to freight or passengers at said point of intersection; and the charge per mile for transportation of freight or passengers shall never exceed the regular charges for like service on the Chicago, Iowa and Nebraska Railroad; the intent and meaning of this section being to secure to the citizens of Lyons the same privileges and benefits of a railroad connection that are enjoyed by any other place on said Chicago, Iowa and Nebraska Railroad; and it is further expressly provided that no lands shall be certified by the Governor to said Cedar Rapids and Missouri River Railroad Company until they have complied with all the requirements of this section.

"SEC. 7. Said company shall not commence to build or construct said road at any point further west from the Mississippi River than the town of Marion, in Linn county, Iowa, and the Governor of the state shall not certify any of the lands herein transferred to said company, until that portion of the road between Marion and the city of Cedar Rapids, together with so much more of said road as to make in the aggregate at least twenty miles, shall be completed, equipped and operated by said company and its successors.

"SEC. 8. And be it further enacted, that it shall be deemed a felony for the President and Directors or Managers of the said railroad company accepting the grant of land to be conveyed by this act to wilfully misapply any of the land herein granted, to any other purpose than the carrying into effect of the true meaning and intent of this act, and the President, Directors or Managers of said railroad company who may be guilty of any such wilful misapplication of the lands herein

granted, shall be liable to a fine of not less than five thousand dollars, or imprisonment in the county jail not less than twelve months and not more than three years, or both such fine and imprisonment, at the discretion of the court before whom any case may be tried.

"SEC. 9. It is further expressly provided, that if said Cedar Rapids and Missouri River Railroad Company shall fail or refuse to accept of this grant upon the conditions hereby imposed, and in time and manner, as aforesaid, the Census Board of this state is hereby authorized, by proper writing, with the seal of the state affixed thereto, to confer the same upon such party or company as shall, in their judgment, be competent to carry out the enterprise hereinbefore provided for in good faith, and which shall accept the grant by a properly written instrument, duly executed and attested, and shall file the same in the office of the Secretary of this State, subject to all the preceding sections of this act, and the same shall in that case, be applicable to such grantee, subject to all the foregoing terms and conditions of this act as fully as if named and originated herein.

"SEC. 10. This act shall take effect and be in force from and after its publication in the Iowa State Register and in the Iowa State Journal."

Approved March 26, 1860.

"I hereby certify that the foregoing act was published in the Iowa State Journal, April 7, 1860, and in the Iowa State Register, April 11, 1860.

"ELIJAH SELLS,

"*Secretary of State.*"

(Tr. pp. 249–257).

And plaintiff introduced in evidence the act of Congress approved June 2, 1864, viz:

"*An Act to amend an act entitled 'An Act making a grant of land to the state of Iowa, in alternate sections, to aid in the constuction of certain railroads in said State,' approved May 15, 1856.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Mississippi and Missouri Railroad Company, corporation established by the laws of the state of Iowa, and to which the said state granted a portion of the land grant mentioned in the title of this act, to aid in the construction of a railroad from Davenport to Council Bluffs in said state, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof now on file in the general land office of the United States, so as to secure a better and more expeditious line for connection with the Iowa branch of the Union Pacifi cRailroad: *Provided, nevertheless*, That said new line, if located, shall in every case pass through the corporate limits of the cities of Des Moines and Council Bluffs; and the right of way over the public lands of the United States is hereby granted to said railroad company for that purpose: *Provided*, That said line shall pass through the town of Newton, in Jasper county, or as near said town as may be found practicable, and not further north of said town than the north line of section twenty-two, township eighty, north, of range nineteen, according to United States survey, if the citizens of the county of Jasper shall first pay to said company the difference in cost, if any, between the line proposed by the company and the one contemplated by this proviso, including extra cost of right of way, if any, said difference in cost to be estimated by competent engineers, to be selected by the parties.

"SEC. 2. *And be it further enacted*, That whenever such new location shall have been established, the said railroad company shall file in the General Land Office at Washington a map, definitely showing such new location; and the Secretary of the Interior shall cause to be certified and conveyed to said company from time to time, as the road progresses, out of any public lands now belonging to the United States not sold, reserved or otherwise disposed of, or to which a pre-emption claim or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title from the United States, or from the state of Iowa, within six miles of said newly located line, an amount of land per mile equal to that originally authorized to be granted to aid in the construction of said road by the act to which this is an amendment; and if the amount of land granted by the original act to aid in the construction of said railroad shall not be found within the limit of six miles from said line, then such selections may be made along such line within twenty miles thereof: *Provided*, That the said company shall not be entitled to, and shall not receive, any land upon this grant which is situate within fifteen miles of the line of the Burlington and Missouri River Railroad, as indicated by the map of said road, now on file in the General Land Office.

"SEC. 3. *And be it further enacted*, That the Burlington and Missouri River Railroad Company, a corporation organized under the laws of the state of Iowa, and to which said state granted a portion of the land grant mentioned in the title of this act to aid in the construction of a railroad from Burlington, in said state, to the Missouri River, shall be entitled to receive, and the Secretary of the Interior shall cause to be certified and

conveyed to said company, from time to time, as the road progresses, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption claim or right of homestead settlement has not attached, or on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the state of Iowa, within six miles of said road, as now located, an amount of land per mile equal to that mentioned in the act to which this act is an amendment, as intended to aid in the construction of said road, and if the amount of land granted by the original act to aid in the construction of said road shall not be found within the limit of six miles from the line of said road, then such selections may be made along such line within twenty miles thereof.

"SEC. 4. *And be it further enacted*, That the Cedar Rapids and Missouri River Railroad Company, a corporation established under the laws of the state of Iowa, and to which the said state granted a portion of the land mentioned in the title of this act, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof, now on file in the General Land Office of the United States, so as to secure a better and more expeditious line to the Missouri river and to a connection with the Iowa branch of the Union Pacific Railroad; and for the purpose of facilitating the more immediate construction of a line of railroads across the state of Iowa, to connect with the Iowa branch of the Union Pacific Railroad Company, aforesaid, the said Cedar Rapids and Missouri River Railroad Company is hereby authorized to connect its line by a branch with the line of the Mississippi and Missouri Railroad

Company; and the said Cedar Rapids and Missouri River Railroad Company shall be entitled, for such modified line, to the same lands and to the same amount of lands per mile, and for such connecting branch the same amount of land per mile, as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant, and, for the same purpose, right of way through the public lands of the United States is hereby granted to said company. *And it is further provided*, That whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing such modified line and such connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the state of Iowa, within fifteen miles of the original main line an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of land per mile granted, or intended to be granted by the original act, to aid in the construction of said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting

branch within twenty miles thereof: *Provided, however*, That such new located or modified line shall pass through or near Boonesboro, in Boone county, and intersect the Boyer River not further south than a point at or near Dennison, in Crawford county; *And, provided further*, That in case the main line shall be so changed and modified as not to reach the Missouri River at or near the 42d parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri River, to construct a branch road to some point in Monona county, in or at Onawa city; and to aid in the construction of such branch the same amount of lands per mile are hereby granted as for the main line, and the same shall be reserved and certified in the same manner; said lands to be selected from any of the unappropriated lands, as hereinbefore described, within twenty miles of said main line and branch; and said company shall file with the Secretary of the Interior a map of the location of the said branch. *And provided, further*, That the lands hereby granted to aid in the construction of the connecting branch aforesaid shall not vest in said company nor be encumbered or disposed of except in the following manner: When the Governor of the state of Iowa shall certify to the Secretary of the Interior that the said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the Secretary shall convey to said company one-third, and no more, of the lands granted for said connecting branch. And when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said secretary may convey to the said company another third of the lands for said

connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the Secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch: *Provided, however,* That no lands shall be conveyed to said company on account of said connecting branch road until the Governor of the state of Iowa shall certify to the Secretary of the Interior that the same shall have been completed as a first-class railroad. And no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and Missouri Railroad as laid down on a map on file in the General Land Office; *Provided, further,* That it shall be the duty of the Secretary of the Interior, and he is hereby required, to reserve a quantity of land embraced in the grant described in this section, sufficient, in the opinion of the Governor of Iowa, to secure the construction of a branch road from the town of Lyons, in the state of Iowa, so as to connect with the main line in or west of the town of Clinton, in said state, until the Governor of said state shall certify that said branch railroad is completed according to the requirements of the laws of said state: *Provided, further,* That nothing herein contained shall be so construed as to release said company from its obligation to complete the said main line within the time mentioned in the original grant: *Provided, further,* That nothing in this act shall be construed to interfere with or in any manner impair any rights acquired by any railroad company named in the act to which this is an amendment, or the rights of any corporation, person or persons, acquired through any such company; nor shall it be construed to impair any vested right of property.

but such rights are hereby reserved and confirmed: *Provided, however*, That no lands shall be conveyed to any company or party whatsoever, under the provisions of this act and the act amended by this act, which have been settled upon and improved in good faith by a *bona fide* inhabitant, under color of title derived from the United States or from the state of Iowa adverse to the grant made by this act or the act to which this act is an amendment. But each of said companies may select an equal quantity of public lands as described in this act within the distance of twenty miles of the line of each of said roads in lieu of said lands thus settled upon and improved by *bona fide* inhabitants in good faith under color of title as aforesaid.

SEC. 5. *And be it further enacted*, That the Mississippi and Missouri Railroad Company shall have the right to transfer and assign all or any part of the grant hereby made to said company to any other company, or person or persons, if, in the opinion of said company, the construction of the said railroad across the state of Iowa will be thereby sooner and more satisfactorily completed, but such assignee shall not in any case be released from the liabilities and conditions accompanying this grant, nor acquire perfect title in any other manner than the same would have been acquired by the grantee herein named: *Provided*, That said transfer and assignment shall first be authorized by the Governor of the state of Iowa:

"SEC. 6. *And be it further enacted*, That the Dubuque and Sioux City Railroad Company may so far change their line between Fort Dodge and Sioux City as to secure the best route between those points; said change shall not impair the right to, nor change the location of, their present land grant. A map of the change shall

be filed with the Commissioner of the General Land Office within one year after the passage of this act.

"SEC. 7. *And be it further enacted*, That all the conditions and limitations contained in the act to which this is an amendment, and not expressly changed by this act, shall attach to and run with the grants made by this act, except as the said conditions and limitations have been modified, and may hereafter be modified, by the General Assembly of the state of Iowa.

"SEC. 8. *And be it further enacted*, That no lands hereby granted shall be certified to either of said companies until the Governor of the state of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof as aforesaid of the completion of the additional sections of the road as aforesaid; to and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the Legislature of the state of Iowa, to aid in the completion of such road.

SEC. 9. *And be it further enacted*, That all lands hereafter certified to either of the land-grant railroads in said state, and lying opposite any completed section of such road, shall be offered for sale by the company to which they shall be certified within three years from the completion of such section, if then certified; and if not, then within three years the date of such certificate,

at reasonable prices; and if not all sold within that period then during the fourth year all such lands remaining unsold shall be exposed to public sale, after previous notice posted at the county seat of the county in which such lands shall be situated, to the highest bidder, and in tracts not exceeding one hundred and sixty acres each."

Approved, June 2, 1864.

(Tr. pp. 259–272.)

Plaintiff offers in evidence a certified copy of the map showing the definite location of the Iowa Central Air Line Railroad, filed on the 18th day of June, 1857, with certificate of engineer attached—attached to transcript as exhibit "No. 1," and hereby referred to. Said map, from the nature of it, it is impossible and impracticable to set out in abstract.

Certified copy of letter from Bernhart Henn, agent for the selection of lands, to Thos. A. Hendricks, Commissioner of General Land Office, dated September 4, 1856, attached to transcript, pp. 273–276, marked exhibit "2" "viz:

CHICAGO, ILL., Sept. 4, 1856.

"Sir: For and in behalf of the state of Iowa and the four several railroad companies which, by the act of the Legislative Assembly of said state of Iowa, July 14, 1856, were constituted the beneficiaries of the grants of land made to said state by the act at Congress approved May 15, 1856, and as the legally appointed agent of said state and of said companies, I hereby select the unsold land in the sections and parts of sections, designated by odd numbers, between the six and fifteen mile limits on each of the roads to make up the deficiency caused in the odd numbered sections within the six mile limits, by sales

or valid pre-emption rights existing prior to the grants made to said state by said act of Congress.

"Very respectfully, your obedient servant,

"BERNHART HENN, *Agent, &c,*

"Hon. Thos. Hendricks, Commissioner General Land Office, Washington City, D. C.

(Tr. pp. 273–276.)

Certified copy of letter from Thomas A. Hendricks, Commissioner of the General Land Office, to Bernhart Henn, dated Jan. 19, 1857, attached to transcript as exhibit "3."

"GENERAL LAND OFFICE, Jan. 19, 1857.

"Hon. B. Henn, Agent State of Iowa and Iowa R. R. Companies, present:

"SIR:—I have fully examined and conside communication of the 14th inst., on behalf of t railroad companies, and am unable to agree wit the conclusion at which you have arrived.

"The grant to the state of Iowa, it is to aid in the construction of railroads within her limits. That the grant would fall under the control of corporations created by the state of Iowa, must have been anticipated by Congress.

"I am, very respectfully, your obedient servant,

"THOS. A. HENDRICKS,

(Tr. pp. 277). "*Commissioner.*"

Certified copy of a letter from Thos. A. Hendricks, Commissioner, to Receiver of Land Offices, at Dubuque, Chariton, &c., dated Jan. 28, 1858. (Attached to Tr. as exhibit "4."

"GENERAL LAND OFFICE, Jan. 28, 1858.

"Register and Receiver Land Office, Dubuque, Chariton, Fort Des Moines, Council Bluffs, Sioux City and Fort Dodge:

"GENTLEMEN: For your guidance in disposing of the

public lands, I have this day transmitted you, by mail, a diagram of the district of lands subject to sale at your office, upon which has been traced the lines of route and the lines of the six and fifteen mile limits, within the said district, of the railroad to aid in the construction of which a grant of lands was made to the state of Iowa by act of Congress approved May 15, 1856.

"As all the vacant tracts in the odd numbered sections, outside of the six and within the fifteeen mile limits have been selected by the agent of the state in lieu of the lands sold and pre-empted in the alternate sections granted by the act above mentioned, such tracts are not restored to market by notice No. 591, copy herewith, and you will, of course, continue to reserve them, as heretofore, from sale or location for any purpose whatever.

"Respectfully, your obedient servant,

"THOS. A. HENDRICKS,

Tr. pp. 279–282). "*Commissioner.*"

Certified copies of order from Thos. A. Hendricks to Register and Receiver at Dubuque, Sioux City, Chartion, Fort Des Moines and Council Bluffs, dated May 10, 1856, attached to transcript as exhibit "5," each of which are as follows:

"GENERAL LAND OFFICE, May 10, 1856.

"Register and Receiver:

"You will suspend from sale or location all the lands in your district until further orders. Acknowledge the receipt of this dispatch by telegraph and mail.

THOS. A. HENDRICKS,

(Tr. pp. 283–285). "*Commissioner.*"

Certified copy of order from Thos. A. Hendricks, Commissioner General Land Office, to Register and

Receiver at Fort Dodge, Iowa, May 10, 1856—a transcript as exhibit "5"—as follows:

"GENERAL LAND OFFICE, May 10, 1856.

"Register and Receiver, Fort Dodge, Iowa:

"You will suspend from sale or location all the lands in your district situated south of the line which divides townships ninety-two and ninety-three, until further orders. Acknowledge the receipt of this dispatch by telegraph and mail.

"THOS. A. HENDRICKS,

(Tr. p. 285). "*Commissioner.*"

Certified copy of letter from Thos. A. Hendricks, Commissioner, to Register and Receiver at Sioux City, Iowa, dated May 15, 1856—attached to transcript as exhibit "6"—viz:

"GENERAL LAND OFFICE, May 15, 1856.

"Register and Receiver, Sioux City, Iowa:

"GENTLEMEN: By my telegraphic dispatch of the 10th inst. you were directed to suspend from sale or location all the lands in your district situated south of the line dividing townships 91 and 92, until further orders. The object of this withdrawal was to protect from sale the lands granted to the state of Iowa, for four railroads running from the Mississippi River to the Missouri River, by a bill which has just passed both houses of Congress.

"Said bill having this day been approved by the President, has became a law, and you will continue to withhold the lands from sale or location until otherwise directed.

"It is designed to adjust the several grants with as little delay as practicable in order that lands remaining

to the United States may be restored to market.

"I am, very respectfully, your obedient servant,

"THOS. A. HENDRICKS,

"*Commissioner.*"

(Tr. pp. 287–8.)

Certified copy of letter from Commissioner General Land Office to B. Henn, dated Dec. 23, 1856—attached to transcript as exhibit "7"—viz.:

"GENERAL LAND OFFICE, Dec. 23, 1856.

"To Hon. B. Henn, Agent of the State of Iowa, present:

"SIR: In compliance with your request of the 17th inst., I herewith transmit copies of the papers relating to the Des Moines River grants, Iowa, as per schedule which accompanied your letter.

"I am, very respectfully, your obedient servant,

THOS. A. HENDRICKS,

"*Commissoner.*"

(Tr. p. 289.)

Certified copy of letter from commissioner to Bernhart Henn, dated Jan. 19, 1857. Attached to transcript as exhibit "8," viz.:

"GENERAL LAND OFFICE, Jan. 19, 1857.

"Hon. B. Henn, Agent of the state of Iowa and the Iowa railroad companies, present:

"SIR: I have carefully examined and considered your communication of the 14th inst. on behalf of the Iowa railroad companies, and am unable to agree with you in the conclusion at which you have arrived.

"The grant is to the state of Iowa; it is to aid in the construction of railroads within her limits. That the grant would fall under the control of corporations created by the state of Iowa must have been anticipated by Congress. * * * *

"THOS. A. HENDRICKS,

"*Commissioner.*"

(Tr. pp. 290–5.)

Certified copy of letter from commissioner to B. Henn, Jan. 20, 1857—attached to transcript as exhibit "9"—viz.:

"GENERAL LAND OFFICE, Jan. 20, 1857.

"Hon. B. Henn, Agent, &c., present:

"Your communication of the 26th of last September, in behalf of the state of Iowa and the railroad company of that state interested in the grant of May 15, 1856, was understood to be a statement. * *

"Very respectfully, your obedient servant,

"THOS. A. HENDRICKS,

"*Commissioner.*"

(Tr. pp. 297.)

Certified copy of letter from commissioner to B. Henn, dated November 24, 1858—attached to transcript as exhibit "10"—viz.:

"GENERAL LAND OFFICE, Nov. 24, 1858.

"Bernhart Henn, Agent of the state, &c., Fairfield, Iowa:

"SIR: Pursuant to the request of W. T. Steiger, I have to state that the certificate by the Governor of the state of Iowa of the construction of forty miles west from the city of Dubuque of the Dubuque and Pacific Railroad, accompanied by a map exhibiting the same, was received and placed upon the files of this office on the 8th of May, 1858.

"Respectfully, your obedient servant,

"THOS. A. HENDRICKS,

"*Commissioner.*"

(Tr. p. 299.)

Certified copy of letter from commissioner to B. Henn, dated March 4, 1859—attached to transcript as exhibit "11"—viz.:

"GENERAL LAND OFFICE, March 4, 1859.

"Hon. B. Henn, Agent of the Iowa Railroad Cos., Fairfield.

SIR: Herewith I transmit certified copies of seventeen lists approved by the Secretary of the Interior on the 27th of December, 1858. * * * * *

* * * Iowa Central Air Line Railroad.

	6 Mile	*15 Mile.*	*Total.*
Dubuque District.....	1,809.74	3,998.57	5,808.31
Fort Dodge District.....	576.00	59,072,60	59,648.60
Council Bluffs District....	100,588.07	193,377.59	293965.66
Sioux City District.....	132,911,18	137,641.84	270,553.02
	235,884.99	394,090.60	629975.59

* * *

"Very respectfully, your obedient servant,

"JOS. S. WILSON,

"Acting Commissioner."

(Tr. pp. 296–298.)

Certified letter from commissioner to B. Henn, dated October 28, 1859—attached to transcript as exhibit "12"—viz.:

"GENERAL LAND OFFICE, Oct. 28, 1859.

"Hon. B. Henn, Agent Iowa Central Air Line Railroad, Fairfield, Iowa:

"SIR: Herewith I transmit certified copies of two lists of lands, approved by the Secretary of the Interior on the 24th inst., inuring to the state of Iowa under the act of Congress approved May 15, 1856.

"These lists comprise the sections in place * * within the fifteen mile limits of the Iowa Central Air Line Railroad * * * * *

"With respect, your obedient servant,

J. A. SMITH,

(Tr. pp. 303–5). *"Commissioner."*

Certified copy of letter from Commissioner to Register and Receiver at Council Bluffs, Sioux City, &c., dated June 16, 1864—attached to transcript as exhibit "13"—viz:

GENERAL LAND OFFICE, June 16, 1864.

"Register and Receiver, Council Bluffs, Iowa:

"GENTLEMEN: The Secretary of the Interior, at the request of the Iowa delegation in Congress has directed that all the public lands in said state be withdrawn from location and entry by individuals, with a view to facilitate the adjustment of the several grants of lands recently made by Congress to the state of Iowa.

"You are therefore hereby instructed to withdraw from sale, location, homestead entry or pre-emption claim, all the public lands within your district, now subject to sale, from the date of the receipt of this letter, excepting that you will allow the completion of the selections by the state under the grant for agricultural colleges.

"The receipt of this you will promptly acknowledge, stating the date at which it may reach you, thus interdicting thereafter the disposal of any tract with the exception mentioned.

Very respectly,

J. M. EDMUNDS,

"*Commissioner.*"

Copy of this sent to land office at Sioux City, Council Bluffs, Fort Dodge and Des Moines.

(Tr. pp. 307-311).

Certified copy of letter from Commissioner to Secretary of Interior, dated June 25, 1864—attached to transcript as exhibit "14"—viz.:

"DEPARTMENT OF INTERIOR.

"GENERAL LAND OFFICE, June 25, 1864.

"Hon. J. P. Usher, Secretary of Interior:

"SIR: I have the honor to acknowledge the receipt of a letter from Hon. J. W. Grimes and Hon. James Harlan, which was referred by you to this office the 23d inst. for report, and, in reply thereto, state that after a careful reading of the law referred to by those gentlemen, approved June 2, 1864, amendatory to the act entitled "An Act making a grant of land to the state of Iowa, in alternate sections, to aid in the construction of certain railroads in said state," approved May 15, 1856, I am satisfied that it operates upon *all* public lands belonging to the United States at the date of said enactment, and lying within the prescribed limits of the several lines of road mentioned, saving rights of prior inception, consequently not only takes hold of the odd, but the even numbered sections also.

"J. M. EDMUNDS,

(Tr. pp. 312-316). "*Commissioner.*"

Certified copy of letter from Wm. T. Steiger, to commissioner, dated May 12, 1865 attached to transcript as exhibit "15"—viz.:

WASHINGTON, May 12, 1865.

"Hon. Jos. S. Wilson, Acting Commissioner, General Land Office:

"SIR: I have the honor to enclose herewith a joint communication bearing date the 8th inst., just received from W. W. Walker, Esq., Vice-President, and Hon. Oakes Ames and John I. Blair, Esq., agents of the Cedar Rapids and Missouri River Railroad Company, of Iowa, on the subject of alleged homestead and pre-emption settlements permitted on lands already vested by law in said road under the grants of Congress, as we hope to

be able to show to the satisfaction of the department.

"In the meantime, to prevent much embarrassment, I respectfully request.

"1. That instructions may be immediately given to the local land offices, forbidding the allowance of homestead and pre-emption entries on the even numbered sections within fifteen miles of the line of road as fixed and established under the act of May 15, 1856, or upon any of the sections (even or odd) within the additional five miles on each side thereof granted by act of the 2d of June, 1864; and,

"2. That all homestead and pre-emption entries and locations of the above mentioned lands, settled on or after June 2d, 1864, (the date of the new grant) may be suspended, with a view to their examination and cancellation. As the agent of the Burlington and Missouri River Railroad Company, I beg leave to prefer similar requests relative to such settlements and entries within the adjusted limits of their grants.

"W. T. STEIGER,

Agent, &c.

(Tr. pp. 317–323.)

Certified copy of letter from commissioner to James Harlan, dated May 26, 1865—attached to transcript as exhibit "16"—viz.:

"DEPARTMENT OF INTERIOR

"GENERAL LAND OFFICE, May 26, 1865.

"Hon. James Harlan, Secretary of Interior:

"SIR: I have the honor to enclose herewith a letter from Wm. T. Steiger, agent, &c., accompanied by a letter from W. W. Walker to him, on the subject of vacant lands within the 15 and 20 mile limits of certain railroad grants in Iowa; and respectfully request instructions as

to the order Mr. Steiger requests this office to make in reference to said lands.

"J. M. EDMUNDS,
"*Commissioner.*"

(Tr. pp. 324–328.)

Certified copy of letter from commissioner to James Harlan, Secretary of Interior, dated May 30, 1865—attached to Burdette letter as exhibit "K" which Burletter is introduced in evidence by stipulation, hereinafter referred to. Said exhibit "K" is as follows:

"DEPARTMENT OF INTERIOR,
"GENERAL LAND OFFICE, May 30, 1865.

"Hon James Harlan, Secretary of Interior:

"SIR: Your letter of the 27th inst. is received, requesting a report from this office as to the action taken respecting the land grants referred to in my letter of the 26th inst., under act of 2d June, 1864, and, in compliance therewith, I have the honor to submit the following:

"Shortly after the passage of the act of June 2d, 1864, amending 'An Act making a grant of land to the state of Iowa, in alternate sections, to aid in the construction of certain railroads in said state,' approved May 15, 1856, at the request of the delegation in Congress from Iowa, this office dispatched instructions to the several land offices in that state, June 16, 1864, by direction of the Secretary of the Interior, to withdraw from market all the vacant public lands until the several grants under said act could be adjusted.

"2. Those instructions were subsequently modified so as to allow the state to complete the selections under the agricultural act, to permit several counties to locate

swamp indemity and also to allow homestead and pre-emption entries.

"3. Under date of 25th June, 1864, this office expressed to the Hon. Secretary of the Interior its judgment that the act of June 2, 1864, 'operates upon all public lands belonging to the United States at the date of said enactment, and lying within the prescribed limits of the several lines of road mentioned, saving rights of prior inception; consequently not only takes hold of the odd, but the even numbered sections also.'

"In view of that opinion, this office can see no objection to compliance with the request of Mr. Steiger, as stated in his letter referred to you with mine of the 26th inst.

"In this connection it is deemed proper to refer to letters herewith from the register and Receiver at Fort Dodge and Hon. A. W. Hubbard, upon the subject of restoring the public lands in Iowa to market. These letters having been referred to this office by Geo. C. Whiting acting chief clerk, the 18th and 19th inst.

"It will be seen from the aforesaid instructions of June 16, 1864, to the land offices in Iowa, that no vacant public lands in the state are now subject to ordinary private sale or location, and as the several railroad interests are considered fully protected by law, I can see no advantage to be gained, either by the state or the general government, in continuing to withhold these lands from market, but on the contrary, think that both interests would be promoted by their restoration to sale, as requested in the letter referred to, so as not to interfere with the grants under acts of June 2 and May 12, 1864.

"J. M. EDMUNDS,
"*Commissioner.*"

(Tr. pp. 372.)

Certified copy of letter from Secretary of Interior to Commissioner Edmunds, dated June 2, 1865—attached to Burdette letter as exhibit "L"—which Burdette letter is hereinafter referred to. Said exhibit "L" is as follows:

"DEPARTMENT OF INTERIOR,
"WASHINGTON, D. C., June 2, 1865.

"SIR: I herewith return your letters of 2d April and 2d May last, from the Register and Receiver at Fort Dodge, Iowa, and the Hon. A. W. Hubbard, respectively, recommending the restoration to market of certain lands in Iowa, and to inform you that the views expressed in your communication in relation thereto, dated the 30th ultimo, are approved and you are requested to give effect to them.

JAMES HARLAN.

(Tr. pp. 372-273). "*Secretary.*"

Certified copy of letter from Commissioner, to Register and Receiver at Council Bluffs, Sioux City, &c., dated June 7, 1865—attached to transcript as exhibit "17"—viz.:

DEPARTMENT OF INTERIOR, June 7, 1865.

"Register and Receiver, Council Bluffs, Iowa:

GENTLEMEN: On the receipt hereof you will allow no entries for homesteads, pre-emptions or locations, for any purpose, in your district on the even numbered sections lying within the fifteen mile limits as fixed under the act of the 15th of May, 1856, and shown on the diagram heretofore furnished your office, nor upon any of the sections, odd or even, within the additional five miles or twenty mile limits on each side thereof, granted by act of June 2, 1864, of the following railroads, viz.: The Burlington and Missouri River Railroad, the Miss-

issippi and Missouri River Railroad, the Cedar Rapids and Missouri River Railroad.

"In the meantime, any entries or locations which have been permitted by you under existing instructions, subsequent to the 2d of June, 1864, except those of prior inception, will be held in suspense for investigation and adjustment at this office.

"You will please acknowledge receipt of this letter.

J. M. EDMUNDS,

"*Commissioner.*"

(Copy of above letter also sent Register and Receiver at Des Moines, Fort Dodge and Sioux City.) (Tr. pp. 329--333).

Certified copy of letter from Edmunds, Commissioner, to Register and Receiver at Council Bluffs, dated July 6, 1866—attached to transcript as exhibit "18"—viz.:

"DEPARTMENT OF INTERIOR,

"GENERAL LAND OFFICE, July 6, 1866.

"GENTLEMEN: I herewith enclose two descriptive lists of lands in your district heretofore withheld from ordinary private entry for the adjustment of land grants to the state of Iowa for railroad purposes: The one embracing 18,821.43 acres, held at the double minimum price of $2.50 per acre, the other 236,598 at the ordinary minimum of $1.25.

"I also enclose herewith a copy of notice No. 711, of yesterday's date, under which these lands will again become subject to ordinary private entry on Monday, the 1st day of October, 1866, and the lands similarly situated in the other districts of the state at dates therein specified.

"You will retain said lists in your office, open to the inspection of parties desiring to purchase. The

enclosed notice you will cause to be published immediately in some newspaper of general circulation in your district, the publication to be continued at least once a week until the 29th of October next, the latest date fixed in the notice for the lands in any of the districts to be restored to market.

"Printed copies of the notice will be transmitted to you in a few days for distribution.

"J. M. EDMUNDS,

"*Commissioner.*"

"Register and Receiver, Council Bluffs, Iowa. (Tr. pp. 334--5.

Certified copy of letter from Commissioner to Register, Sioux City, dated August 23, 1866—attached to transcript as exhibit "19"—viz.:

DEPARTMENT OF INTERIOR,

GENERAL LAND OFFICE, Aug. 23, 1866.

"Register Land Office, Sioux City, Iowa.

"SIR: In reply to your letters of the 14th inst., I have to state that the even numbered sections within the 5.15 and 20 mile limits of the Cedar Rapids and Missouri River Railroad are not subject to homestead or pre-emption, whilst all the lands designated in the list of vacant lands sent you are subject to both of said laws.

"JOS. S. WILSON,

(Tr. pp. 336--340). "*Acting Commissioner.*"

Certified copy of letter from Commissioner to Register and Receiver, Council Bluffs, Iowa, dated September 20, 1866, attached to transcript, as exhibit "20" viz.:

"DEPARTMENT OF INTERIOR,

"GENERAL LAND OFFICE, Sept. 20, 1866.

"GENTLEMEN:—We have a letter from Isaac Cook, Commissioner for Cedar Rapids and Missouri River Rail-

road, representing that claims are being allowed to lands granted to the state for the benefit of said road, by act of 1856, and that parties in virtue of such claims, are entering upon the land and dispoiling it of timber, greatly to the damage of the interests of the road, and requesting instructions to be given to the proper officers on the subject.

"You are, therefore, advised that all claims having inception subsequent to the location of the line of road —when the right inures to the state—should be rejected, and, if any such have been allowed, you are instructed to notify the parties that they will be cancelled.

"Where parties claim the right of pre-emption in virtue of actual settlement and cultivation prior to the grant to the state, you will notify the state authorities or representatives of the road, as to the claim, and of the time and place of taking proof in support of such claim.

"The act of June 2, 1864, grants to the several roads therein mentioned, in the state of Iowa, all the vacant public lands—odd and even numbered sections within the limits of each, 20 miles—hence *no* homestead entry or pre-emption claim which was initiated *after* the passage of said law, will be approved. You will, therefore, disallow all such claims, and notify parties who have been permitted to make them heretofore, that said claims will be cancelled by this office.

"You will please promptly report particulars in each and all cases, in which you may take action under these instructions.

"JOS. S. WILSON,

"*Commissioner.*"

Register and Receiver, Council Bluffs, Iowa.

(Tr. pp. 341–344.)

Certified copy of letter from Jos. S. Wilson, Com-

missioner, to Register and Receiver at Council Bluffs, dated August 5, 1867, attached to transcript as exhibit "21," viz.:

"DEPARTMENT OF INTERIOR
"GENERAL LAND OFFICE, August 5, 1867.

"GENTLEMEN—In reference to the lands in your district, which were withdrawn from ordinary private entry for railroad purposes, the 23d of June, 1864, ordered to be restored thereto on the 1st of October, 1866, per printed notice 711, and the restoration of which was postponed by order of Secretary of Interior, for one year from the 5th of July, 1866, the date of the notice as per our letter to your office of the 21st of September, 1866, I have to state that the period of the postponement expired on the 5th ultimo; but the lands will not be subject to ordinary private entry until the usual thirty days' public notice thereof shall be given by advertisement in some newspaper of general circulation in your district. This you will do without delay, and forward a copy of the newspaper containing the advertisement to this office.

J. S. WILSON,
"Commissioner."

"Register and Receiver, Council Bluffs, Iowa."

(Tr. pp. 345–346.)

Certified copy of letter from Commissioner to Register and Receiver at Council Bluffs, dated November 11 1867, attached to transcript as exhibit "22," viz.:

"DEPARTMENT OF INTERIOR,
"GENERAL LAND OFFICE, November 11, 1867.

"Register and Receiver, Council Bluffs' Land Office, Iowa:

"GENTLEMEN—Pursuant to your request of the 2d inst. I enclose herewith a copy of two lists of vacant

lands which you proposed this day to restore to ordinary private entry at $2.50 and $1.25 per acre: as the time for offering has elapsed, I have to request that you give at least thirty days' notice, and advise this office to that effect. Said lists are to take the place of the two reported destroyed by fire last June.

"JOS. S. WILSON,

"*Commissioner.*"

(Tr. pp. 347-348.)

Certified copy of letter from John I. Blair to commissioner Wilson, dated Dec. 19, 1867, attached to transcript as exhibit "23," viz:

"WASHINGTON, Dec. 19, 1867.

"Hon. Joseph Wilson, Commissioner General Land Office:

"SIR: I have the honor to enclose a map showing the Western Terminus of the Cedar Rapids and Missouri River Railroad, Iowa, which I respectfully request may be attached to the map of definite location heretofore filed.

"JOHN I. BLAIR,

"Prest. C. R. & M. R. R. Co."

(Please acknowledge, directed to me, Blairstown, N. J.)

(Tr. pp. 322.)

Certified copy of the final certificate of Governor of Iowa as to completion of C. R. & M. R. R. R. dated July 2, 1867, attached to transcript as exhibit "24," viz:

"STATE OF IOWA,

"EXECUTIVE DEPARTMENT.

"This certifies, in accordance with the act of Congress, approved June 2, 1864, that the Cedar Rapids and Missouri River Railroad Company, a company organized under the laws of Iowa, has completed and ready for the

rolling stock, prior to the 1st day of July, 1865, a section of more than twenty miles of said company's railroad, from the point which was the terminus of said railroad on the 2d day of June, 1864; and also an additional section of more than twenty miles, between the 1st day of July, 1865, and July, 1866; and also another additional section of more than twenty miles, between the 1st day of July, 1866, and July, 1867, as required by act of Congress approved June 2, 1864. It is further stipulated, certified, that in addition to the above, the said railroad has completed and put in operation seven additional sections of twenty miles each, and eleven miles and six tenths of a mile of the next section of twenty miles, thus making, in all, thirteen consecutive sections of twenty miles each, and eleven and six tenths of a mile over and beyond said thirteen sections, the same being altogether two hundred and seventy-one and six-tenths miles.

"The said railroad is built as near as practicable to the forty-second parallel of latitude across the state of Iowa to the Missouri River, on a gauge of four feet, eight and one-half inches, of a good quality of Iron and approved pattern, with 2,640 ties to each mile, and in all respects equal to the average of other first-class western railroads, as required by, and in accordance with, the acts of Congress relating thereto, approved May 15, 1856, and June 2, 1864, and the act of the General Assembly of the state of Iowa, approved March 26, 1860.

"In testimony whereof I have hereunto affixed my name and caused to be affixed the great seal of the state of Iowa.

[SEAL]

Done at Des Moines, 2d day of July, 1867, etc..

"WM. STONE,
"*Governor of Iowa.*"

"By the Governor,

"ED. WRIGHT, Secretary of State" (Tr. pp. 349-357)

Certificate of the Governor of Iowa with reference to completion of Lyons plug railroad, dated October 21, 1870—attached to transcript as exhibit "25," viz:

STATE OF IOWA,

"EXECUTIVE DEPARTMENT.

"To the Hon. J. D. Cox, Secretary of Interior, Washington, D. C.:

"I, Samuel Merrill, Governor of the state of Iowa, do hereby certify, that the Cedar Rapids and Missouri River Railroad, a railroad corporation, organized and existing under the laws of the state of Iowa, has built a branch railroad from the town of Lyons, in the state of Iowa, to connect with the main line of the Chicago, Iowa and Nebraska Railroad in the town of Clinton, in said state, and that the said branch is built from Pearl street, in Lyons City aforesaid, to a point of intersection with the said Chicago, Iowa and Nebraska Railroad, within the corporate limits of the said city of Clinton, with all the necessary switches and side tracks that the business of the said town of Lyons requires; that the same is of a guage of four feet, eight and one-half inches, being the same as the Chicago, Iowa and Nebraska Railroad, and in all respects of equal quality with the last mentioned railroad; that the said branch railroad was built and constructed by the said Cedar Rapids and Missouri River Railroad Company in the years 1867 and 1868, and that the same is run and operated by the Chicago and Northwestern Railway Company, the lessee of the Chicago, Iowa and Nebraska Railroad, in close connection with the trains on the said last mentioned railroad, and that the said branch railroad has been built and is now operated in conformity with the laws of the United States and of the state of Iowa relating thereto.

"In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of State of Iowa.

Executed in duplicate, of which one copy is delivered to the said C. R. & Mo. R. R. R.

[SEAL]

Done at Des Moines, in the State of Iowa, on the 21st day of October, 1870.

SAMUEL MERRILL.

"By the Governor,

"ED. WRIGHT, Secretary of State." (Tr. pp. 357–360.)

Plaintiff also introduces in evidence a map of the Cedar Rapids and Missouri River Railroad, with certificate indorsed thereon, filed in General Land Office, July 11, 1865, attached to transcript as exhibit "26" and which from its nature it is impossible to set out in abstract, and is hereby referred as part of transcript.

Also, map with certificates thereon, showing the line and limits of the Cedar rapids and Missouri River Railroad, authorized by act of May 15, 1856, and also the amended line and limits authorized by act of June 2, 1864, attached to transcript as exhibit "27," which map, from its nature it is impossible to set out in abstract, and the transcript is hereby referred to.

Certified copy of abstract of declaratory statements filed in the land office at Council Bluffs, Iowa, upon the list of lands described therein, and certificate that there were no declaratory statements filed upon other certain lands embraced in said lists, certified to by F. G. Clark, Register United States Land Office, at Des Moines, Iowa, under date Oct. 2, 1877, attached to transcript as exhibit "28," viz.:

"Abstract of declaratory statements filed in the land office at Council Bluffs, Iowa, during the month of

June, 1865, on lands which have been offered at public sale under the President's proclamation:

No. of Statement filed	Date of Settlement	Date of Filing	Name	Description	Sec.	Tp.	R. W.
5461	1865 June 14	1865 June 16	D. A. Wooster	w ½ ne ¼	6	85	42
5502	1871 April 17	1871 May 18	Francis Smith	n ½ nw ¼	6	85	42

"UNITED STATES LAND OFFICE,

"DES MOINES, IOWA.

"I, F. G. Clark, Register of the United States Land Office, at Des Moines, state of Iowa, hereby certify the above as a true and correct copy of the book of declaratory statements a record kept on file in this office, so far as relates to Nos. 5,461 and 5,502, as having been filed at the late Council Bluffs United States Land Office, as appears from the records on file in this office.

"And I further certify, I have examined, carefully and critically, said Council Bluffs declaratory statement records, from the 1st day of April, 1858, to the 30th day of July, 1873, (the latter date being the date of the discontinuance of the Council Bluffs land office) and from the 1st day of July, 1873, to the 1st day of October, 1877, the records of this office, and I am unable to find that any declaratory statement has been filed on any of the following described lands during the times above specified:

N ½ se ¼	6	85	42
Ne ¼ ne ¼....	6	85	42
Sw ¼ nw ¼ and nw ¼ sw ¼....	6	85	42
E ½ ne ¼	8	85	42
E ½ sw ¼	8	85	42
N ½ ne ¼	10	85	42
E ½ sw ¼	12	85	43
Sw ¼ ne ¼ and se ¼ nw ¼	6	85	43
S ½ nw ¼	4	84	44

Se ¼ nw ¼ and sw ¼ ne ¼	24	85	44
S ½ sw ¼	6	85	45
S ½ nw ¼....	10	84	46
N ½ nw ¼	28	84	46
N ½ nw ¼....	20	84	46
W ½ ne ¼	20	84	46
E ½ ne ¼....	20	84	46

"In testimony whereof I have hereunto set my name, the 2d day of October, 1877.

"F. G. CLARK.

(Tr. pp. 361–2). "*Register.*

The plaintiff introduced the Burdette letter, with exhibits thereto attached, by stipulation hereafter referred to, which letter is as follows:

"DEPARTMENT OF INTERIOR,

"GENERAL LAND OFFICE,

WASHINGTON, D. C., Jan. 19, 1876.

"SIR: I am in receipt of your letter of the 28th ult., relative to the Cedar Rapids and Missouri River Railroad Company its road and the land granted to, or for, and received by said company.

"By the act of Congress approved May 15, 1856, (Statute at large, vol. 11, page 9) lands were granted to the state of Iowa for the purpose of aiding in the construction of certain railroads, among others one 'from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence along said line, running as near as practicable to the 42d parallel across said state to the Missouri River.'

"There is on file in this office a letter dated November 19, 1862, from Samuel J. Kirkwood, Governor of Iowa, giving a brief history of the grant of lands to the state in trust. From this letter it appears that the

lands were granted by the state to the Central Air Line Railroad Company, July 14, 1856, subject to certain conditions.

"On the 1st of December, 1859, no portion of the road had been completed, and the affairs of the company were in a hopeless condition. In the meantime another company, the Chicago, Iowa and Nebraska, had built a road, commencing at Clinton, on th- Mi---ip-i R- River, only two miles from Lyons City, to C id The Legislature of Iowa, ~~and~~ by act of Ma st resumed control of the land by act of Ma b granted the same to the Cedar Rapids a River Railroad Company, upon certain conditions. At the time of writing the letter, November 19, 1862, Gov. Kirkwood claimed that the company had complied with the conditions of the act. It was the practice of this office and department to certify the lands granted to the state for railroad purposes by the act of May, 1856, to said state prior to the construction of the road, or any part thereof. This action was in accordance with the opinion of the attorney general, (Hon. J. Black), dated June 7, 1857, to the effect that the grant to the state vests in said state the title to the lands granted. In accordance with this opinion there were approved to the state of Iowa, prior to June 2, 1864, 775,717.81 acres.*

"By the 4th section of the Act June 2, 1864, (Statute at Large, vol. 13, p. 96), the Cedar Rapids and Missouri River Railroad Company was permitted to modify or change the uncompleted portion of the line. I will add in this connection that it is the practice of this office to certify to the state, under the act of 1856, the lands in the odd numbered sections within the old

*This includes 109,756.81 acres lost by decision of the United States Supreme Court, (December term, 1865) in the Des Moines Improvement grant, which quantity must be added to the deficiency of land to satisfy the grant for the benefit of the Iowa Ccentral Air Line Railroad Company.

or original 15-mile limits of the road, and to certify to the company under the act of June 2, 1864, the lands in the even sections within the 20-mile limits of the modified line, and the 15-mile limits of the original line: also, the lands in the *odd* sections between the 15 and 20-mile limits. I will also add that there is on file in this office a certificate, dated July 2, 1867, signed by W. M. Stone, Governor of Iowa, stating that the Cedar Rapids and Missouri River Railroad Company had constructed a branch road from Lyons to Clinton, as required by the act of June 2, 1864.

"It is also understood that the Cedar Rapids and Missouri River Railroad Company is the successor of the Iowa Central Air Line Railroad Company, and the lands certified by this office to the state of Iowa, for the latter company are regarded as inuring to the grant for the former company. As before stated, the lands were certified to the state, subject to her disposal, and while it is understood that the Cedar Rapids and Missouri River Railroad Company have only actually built the road west from Cedar Rapids(or from western terminus of line, built prior to 1864), with the exception of the line from Lyons to Clinton, yet it received the benefit of the lands certified to the state, east of that point, in accordance with the laws of Iowa. At all events, if such is not the case, this office is not in a position to question the state as to the disposal by her of the lands granted.

"With this preliminary statement, and with the aid of the map and copies, with the orders, etc., transmitted, I will endeavor to reply to your questions, in detail. Your first question is:

"What quantity of lands has the Cedar Rapids and Missouri River Railroad Company of Iowa, received un-

der the act of 1856, and what quantity under the amendment of June 2, 1864?

"Under the act of 1856, it is estimated that the quantity of lands embraced within the limits of the grant is 1,298,730 acres; of this quantity, it is estimated that the company will receive 800,000 acres, of which 782,250 acres have been certified. Under the act of June, 2, 1864, it is estimated that the company will receive 356,988 acres, of which 349,683 have been certified.

"Your second question is:

"Where does the 'modified' line of said company, under act of June 2, 1864, begin and terminate? How long is it, and how much land has it received therefor?

"The modified line begins at Cedar Rapids, or near there, at the western terminus of the line built prior to 1864, and terminates at Missouri Valley, indicated on the map by the letter 'D.' The certificate of the Governor of Iowa states that 271 6-10 miles of road has been constructed. The company has received 1,131,933 acres.*

"The lands certified east of Cedar Rapids are included in this quantity. The company was not required by law to file in this office a map of constructed road. The certificate of the Governor of Iowa, stating that the road has been constructed, is the authority required for certifying the lands under the act of June 2, 1864. On the map transmitted, the original line is marked 'Q B,' and is colored red; the 'modified' line is marked 'C, D,' and is colored green. This is the line of the 'general route,' but it is also understood to be the line of constructed road. The company has claimed no lands north of the 20-mile limits of the original line (also indicated on the map,) as north of said 20-miles' line. On the south the grant is limited by the 15-mile compromise line.

*(This includes the 149,756 85-100 of Ist Des Moines land).

Your third question is:

"Where does the 'Onawa Branch' of said company, under the act of 1864, begin and termininate? How long is it, and how much land has it received therefor?'

"The act of 1864 would seem to contemplate the construction of a branch from the main line east of Onawa City, and from that point to said city. This line is indicated on the map by the letters 'E. F.' It is alleged that route was impracticable, and the road was never built. It appears that a road was actually built for the Cedar Rapids and Missouri River Railroad Company on a line indicated on the map 'D G,' or from Missouri Valley to California Junction. This branch connects with the main line of the Cedar Rapids and Missouri R. R. R. with the S. C. & P. R. R. (the Iowa branch of the Union Pacific Railroad,) passing through Onawa City. It is claimed by the company that the consolidation of this branch with the Sioux City and Pacific Railroad, under the state laws for valuable considerations and inducements, one of which was that the said Sioux City and Pacific Railroad to Onawa City, became virtually, by said agreement, an extension of the Cedar Rapids and Missouri River Railroad to Onawa City, was, for all practicable purposes, intended by the act of Congress June 2, 1864, a compliance with the law requiring said branch to be built. This is called the 'Onawa Branch,' and is about six miles long. No lands have been certified to it as such branch. The lands within the limits of the same, and also within the limits of the branch, indicated by the letters 'E F' (not constructed,) are within the limits of the main line, and have been certified, or are subject to certification for said main line.

"Your fourth question is:

"For how much and what road (other than the

'modified line,') and 'Onawa Branch,' has the company received said lands, and how much land has it received therefor, under the act of 1856, and how much under the amendment of 1864?'

"The lands have all been certified for the Iowa Central Air Line Railroad Company, or its successor, the Cedar Rapids and Missouri River Railroad Company, to aid in the construction of the line from Lyons City to the Missouri River, as authorized by the act of May 15, 1856, and June 2, 1864. It has received 782,280 acres under the act of 1856, and 349,683 acres under the act of 1864, as follows:

"326,721 71-100 acres July 18, 1868.

"15,684 97-100 acres April 20, 1869.

"906 41-100 acres September 2, 1872.

"480 acres November 14, 1873.

"2,218 69-100 acres July 26, 1874.

"3,265 22-100 acres April 6, 1875.

"406 acres November 16, 1875.

"These lands were approved by the Secretary of the Interior; about 800 acres were erroneously certified, and should be deducted from the amount given as received by the company.

"Your fifth question is:

"Were any lands reserved by the Secretary of the Interior, as inuring to said company under the act of 1864, and if so, for what road, at what time, and how much each time?'

"The lands were withdrawn by order of the Secretary of Interior, June 16, 1864, for railroad purposes Copy of order enclosed marked 'A.'

"They were not reserved for any company by name, or in any specified quantity, but all the lands within the

limits of the grants were withdrawn at date above given.

"Your sixth question is:

"Were any lands selected by said company as inuring to it under the grant of 1864, and if so, for what parts of its road, at what times, and how much at each time: and were such selection approved, and if so, by whom?'

"The Cedar Rapids and Missouri River Railroad Company has selected lands as inuring to its grant under the act of 1864, but for no particular portion of its road. The lands have been approved at various times, as given above in my reply to your fourth inquiry, and the selections were approved by the Secretary of the Interior.

"Your seventh question is:

"Were the pre-emption and homestead entries in the Council Bluff and Sioux City land districts made after June 2, 1854, and within the limits of said grant, or any of them, allowed under the rulings or construction of Department or Commissioner, and if so, which of them and on whose authority was the remainder of them allowed?'

"A reference to the copies, orders, correspondences, etc. which I enclosed, will give you the information desired. It will show that the homestead and pre-emption entries allowed after June 2, 1864, were allowed under instructions and orders from this Department and office.

"The lands were originally withdrawn June 16, 1864, copy of order enclosed marked 'A.' In a letter from this office, dated June 25, 1864, copy enclosed, marked 'B' it was stated that the grant took effect upon all public lands within the limit of the grant.

"Under date of August 22, 1864, this office recommended to the Secretary of the Interior, that homestead

and pre-emption entries be allowed in Council Bluffs and Des Moines districts, copy enclosed marked 'C.' The Secretary approved of this view in a letter dated August 24, 1864, copy enclosed marked 'D,' and an order was accordingly issued August 25, 1864, copy enclosed marked 'E,' allowing such entries.

"Under date of 24 May, 1865, Hon. A. W. Hubbard addressed a letter to the Secretary of the Interior, requesting that the lands heretofore withdrawn, except the odd numbered sections, be restored to market and entry, copy of letter enclosed marked 'F.'

"I enclose a copy of a letter from W. T. Steiger, agent of the Cedar Rapids and Missouri River Railroad Company, dated May 12, 1865, marked 'G;' a copy of a letter from this office, dated May 26, 1865, marked 'H;' a copy of a letter from this office, dated May 27, 1865, marked 'I;' a copy of a letter from this office, dated May 30, 1865, marked 'K;' a copy of a letter from the Secretary, dated June 2, 1865, marked 'L;' also, a copy of the order to the district officers, dated June 7, 1865, marked 'M,' forbidding all entries upon railroad lands, both within the original 15-mile limits and the 20-mile limits of the modified line.

"Certain lands in the Sioux City and Council Bluffs districts were ordered to be restored to market by the instructions of this office, dated July 6, 1866, and a list of said lands was furnished to each office. By order, dated August 23, 1866, copy enclosed marked 'N,' the local officers were instruced not to allow homestead or pre-emption entries upon the even sections within the 5, 15 and 20-mile limits of the Cedar Rapids and Missouri River Railroad, but to allow such entries upon the lands described in the lists furnished; in such lists were lands outside the 20-mile limits of the modified line, but

within the 15-mile limits of the original line. Many entries were allowed upon these lands, and this office has refused to cancel the same where patents have issued. The railroad company has appealed from this decision, and said appeal is now pending before the Secretary of the Interior.

"I enclose a copy of the order to the local officers, dated September 20, 1866, marked 'O,' notifying them that no entries should be allowed upon the lands within the 20-mile limits of the road mentioned in the act of 1864, and entries made prior to that date (September 20, 1866,) would be cancelled. I also enclose a copy of an order, dated September 21, 1866, marked 'P.' The Cedar Rapids and Missouri River Railroad Company demand the cancellation of certain entries (among others,) made upon lands outside of the 20-mile limits of the modified line, but within the 15-mile limits of the original line. In the view of this office no valid objection can be made to this demand, except where patents have issued. Such cases are considered *res adjudicata*.

"'Your eighth question is:

"Were the lands within the limits of said grant, or any of them, withdrawn from homestead and pre-emption after the grant, and if so, which of them, by whose orders, at what times and for what reasons?'

"A reference to the orders, correspondence, etc., given above, will furnish the information desired on these points.

"It was supposed that the grant could be satisfied, but on account of the prior claims of the Des Moines River Improvement Company, *which claim was confirmed by the decision of the United States Supreme Court, at the December Term, 1866, it was found impossible, to satisfy the grant for the Cedar Rapids and Mis-

souri River Railroad Company. This supposition may, in part, account for the orders that were issued restoring certain lands to homestead and pre-emption entry.

(Tr. pp. 363–8.)

"Your ninth question is,

"Does the department hold that the said company is entitled to all lands within the limits of the grant which were vacant June 2, 1864, and if not, what does it hold in this regard?

"This Department holds that all the lands in the odd and even numbered sections within the limits of the grant, both within the 20-mile limits of the 'modified line,' and the 15 mile limits of the 'original line,' to which no valid adverse rights subsisted June 2, 1864, inure to the grant for the benefit of the Cedar Rapids and Missouri River Railroad Company. This view, it appears to me, is the only one that can be taken, when the language of the section of the act of June 2, 1864, is carefully considered. It will also be seen from the correspondence, that such was the view of this office at the date of the passage of the act.

"The lands were restored and entries allowed, many of them in accordance with the orders of this Department, but in view of the fact that the lands had been granted by Congress and the rights had vested, these orders were erroneous and illegal, and much hardships to settlers is the result; a hardship that this office is powerless to relieve.

"It is proper to add in this connection, that by the express terms of the 8th section of the act of June 2, 1864, the control of the lands granted to aid in the construction of the various lines of roads mentioned in the act, was vested in the Legislature of Iowa, and in case

*Covering 10,756.85 acres approved for the road, but lost and must be added to the deficiency of lands to satisfy the grant.

of failure to build the roads or any part thereof, no reversion of the United States is provided for, but the title remains in the state for the purposes of the act. As before stated, the lands which form the subject of this communication are within the limits of the main line of the Cedar Rapids and Missouri River Railroad, which has been constructed according to law, and therefore inure to the grant and must be certified accordingly.

"I have endeavored to answer your questions as fully and completely as the records and information in possession of this office will admit.

"There have been proceedings in the courts of Iowa and laws enacted by the Legislature of that state, affecting the grant, especially east of Cedar Rapids, the terms and purport of which are not fully known to this office. The recent decisions of this office and this department are believed to have been in accordance with the laws of Congress of 1856 and 1864.

"Very respectfully,

"S. S. BURDETTE, *Commissioner*."

A

Exhibit "A," attached and referred to in foregoing letter, dated June 16, 1864, is the same order as that introduced in evidence and hereinbefore set out as exhibit "13." (Ab. p. 49). (Tr. p. 369).

B

Exhibit "B" attached and referred to in the foregoing letter, dated June 25, 1864, is the same letter as that introduced in evidence and hereinbefore set out as exhibit "14." (Ab. p. 50). (Tr. p. 369).

C

Exhibit "C" attached and referred to in foregoing letter, dated August 22, 1864, is as follows:

"DEPARTMENT OF INTERIOR.

"GENDRAL LAND OFFICE, Aug. 22, 1864.

"Hon. J. Usher, Secretary of the Interior:

"SIR: I have the honor to enclose to you a letter from Hon. John A. Kasson, asking for a modification of the order heretofore made, withdrawing public lands from sale in Iowa, so as to allow pre-emption claims and homestead entries in the Council Bluffs and Des Moines districts, and I respectfully recommend that this request be granted.

"I am very respectfully, your obedient servant,

JOS. S. WILSON,

(Tr. pp. 369-370). "*Acting Commissioner.*"

D

Exhibit "D," attached and referred to in the foregoing letter, dated August 24, 1864, is as follows:

"DEPARTMENT OF INTERIOR,

WASHINGTON D. C. Aug. 24, 1864.

SIR: I have considered your request of the 22d inst., and the accompanying letter of Hon. Jno. A. Kasson, and cordially assent to the modification of the order withdrawing the public lands from sale, so that homestead and pre-emption claims shall not be inhibited thereby.

"P. P. USHER,

"*Secretary.*"

Commissioner of General Land Office. (Tr. p. 370.)

E

Exhibit "E," attached and referred to in the foregoing letter, dated Aug. 25, 1864.

"GENERAL LAND OFFICE, August 25, 1864.

"Register and Receiver, Des Moines, Iowa:

"GENTLEMEN:—In pursuance of instructions from the Hon. Secretary of the Interior, under date of the 24th inst. the order of the 16th of Jnne last, withdrawing

from sale the public lands in Iowa, is modified so that entries may be made under the homestead and pre-emption laws as before that order was issued, and you will allow such entries to be made accordingly.

"JOS. S. WILSON,
"*Acting Commissioner.*"

(Tr. p. 370.)

A similiar letter sent to Council Bluffs.

F

Exhibit "F,' attached and referred to in the foregoing letter, dated May 2, 1865, is as follows:

"SIOUX CITY, IOWA, May 2, 1865.

"Hon. James Harlan, Secretary of the Interior, Washington, D. C:

SIR: At the request of the Congressional delegation from this state about one year ago, the public lands in this and the Fort Dodge land districts were withdrawn from the market, except for homestead, pre-emption and swamp land entries,etc. From my acquaintance with these districts and the circumstances by which they are now surrounded, I am satisfied that the reason which induced the delegation to make the application at the time, do not now exist.

"At this time there seems to be no inducements nor disposition to settle lands for speculation, but there is a demand for actual settlements. This being the case, there being a general desire on the part of the people that the lands shall be opened for general entry, and I think that the interests of this part of the state require it to be done. I therefore request that the lands heretofore withdrawn may be restored to market, except the odd sections embraced within the railroad grants.

"A. W. HUBBARD."

(Tr. p. 370.)

G

Exhibit "G," attached and referred to in the foregoing letter, dated May 12, 1865, was introduced in evidence and hereinbefore fully set out as exhibit "15." (See ab. p. 50.) (Tr. p. 371.)

H

Exhibit "H," attached and referred to in the foregoing letter, dated May 26, 1865, was introduced in evidence and hereinbefore fully set out as exhibit "16." [See ab. p. 51.] [Tr. p. 371.]

I

Exhibit "I," attached and referred to in the foregoing letter, dated May 27, 1865, is as follows:

"DEPARTMENT OF INTERIOR,
"WASHINGTON, D. C., May 27, 1865.

SIR: I have received your communication of yesterday, with inclosures on the subject of the vacant lands within the 15 and 20-mile limits of certain railroad grants in the state of Iowa, and asking instructions in the premises.

"With a view to a full understanding of the subject, I respectfully request that you will report to me what has been done by your office in relation to said land grants, and what instructions, if any, have been given to the local land offices relative thereto.

"JAMES HARLAN,
"*Secrerary.*"

(Tr. p. 371.)

K

Exhibit "K," attached and referred to in the foregoing letter, was introduced in evidence and hereinbefore set out as exhibit "K," dated May 30, 1865. (See ab. pp. 52-53.) (Tr. pp. 372.)

L

Exhibit "L," attached and referred to in the foregoing letter was introduced in evidence and hereinbefore set out as exhibit "L," dated June 2, 1865. (See ab. pp. 54.) (Tr. pp. 372–3)

M

Exhibit "M," attached and referred to in the foregoing letter, was introduced in evidence and hereinbefore set out as exhibit "17," dated June 7, 1865. [See ab. p. 54.] [Tr. p. 373.]

N

Fxhibit "N," attached and referred to in the foregoing letter, was introduced in evidence and hereinbefore set out as exhibit "19," dated Aug. 23, 1866. [See ab. p. 56.] [Tr. p. 373.]

O

Exhibit "O," attached and referred to in the foregoing letter, dated April 20, 1866, is the same as was introduced in evidence and hereinbefore sat out as exhibit "20" dated September 20, 1866.

(See ab. p. 56.) (Tr. p. 373.)

P

Exhibit "P," attached and referred to in the foregoing letter, dated Sept. 21, 1866, is as follows:

"DEPARTMENT OF INTERIOR,

"GENERAL LAND OFFICE, Sept: 21, 1866.

"Register and Receiver, Sioux City, Iowa:

"GENTLEMEN: The Secretary of the Interior, under date of the 20th inst. has instructed us to order a suspension of the restoration to market of the public lands in the state of Iowa, for one year from the date of our notice, viz., July 5, 1866. You are therefore directed not to make the offering as per our letter of instructions dated 6th, and notice dated 5th of July, 1866, but to hold

the lands as heretofore, subject to pre-emption and homestead settlement only, for the time mentioned, viz: one year from the 5th of July, 1866, unless otherwise ordered. This order is not to be construed as excluding the location of swamp land indemnity certificates, or selections by the state in satisfaction of the grant under the act of July 2, 1862, for the benefit of agricultural colleges and the mechanic arts, which you will allow as heretofore.

"You will please give publicity to this order in some newspaper published in Sioux City.

"JOS. S. WILSON,

"*Commissioner.*"

(Tr. pp. 373–4.)

Copies of above letter sent to Registers and Receivers at Council Bluffs and Fort Dodge.

The foregoing Burdette letter was introduced in evidence by both parties by mutual consent and per stipulation "that the letter of Burdette shall be competent evidence of the matters therein stated and may be introduced by either party."

(Tr. p. 141.)

Plaintiff offers in evidence the testimony of J. Van Deventer, taken by deposition, September 19, 1877, viz:

" My name is James Van Deventer, reside at Clinton, Iowa, occupation, President Iowa Railroad Land Company.

"I have a general knowledge of the lands granted in aid of the Cedar Rapids and Missouri River Railroad, and for some years past have been an officer of that company, and President of the Iowa Railroad Land Company, to which company the Cedar Rapids and Missouri River Railroad Company has sold and conveyed the lands inuring to the grant, so far as they have been certified.

"There have been certified to the state of Iowa, under the act of May 15, 1856, in aid of a railroad 'from Lyons City, northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the 42d parallel, across the state of Iowa to the Missouri River,' 784,056.53 acres of land; of these lands 300,022.83 acres were within the 6-mile and 484,033 70-100 acres within the 15-mile limits; of the aggregate quantity 109,756,.85 acres were excluded from the grant by the decision of the United States Supreme Court, by which it was held that lands selected for the Des Moines Improvement grant never belonged to the grant to the railroads, and certification to that extent was void; the residue of the lands, excepting such as had been sold to individuals from time to time, have been sold and conveyed, as above stated, to the Iowa Railroad Land Company.

"Under the act of Congress of Jnne 2, 1864, there have been certified to the C. R. & M. R. R. R. 359,097.56 acres, of which 126,148.33 acres are outside the 6-mile limits but within the 15-mile limits of the original line of the road; and 226,263.02 acres within the 20-mile limit of the modified line, and 6,686.21 acres within the 6-mile limit of the original line."

Ques.—State generally what claim has been made by the plaintiff to the lands in Monona county under the acts of Congress aforesaid, and what effort has been made to save such lands to the plaintiff?

Ans.—For many years Wm. T. Steiger, a gentleman thoroughly versed in the subject, and possessing great experience in all matters pertaining to land grants, has been at Washington acting as agent for the adjustment of the plaintiff's grant, and every possible effort has been

made to procure certificate of the lands inuring to that grant.

The Cedar Rapids and Missouri River Railroad, as constructed, is 271 6-100 miles long from Cedar Rapids to Council Bluffs, besides the Lyons' plug, so-called, which is 2 41-100 miles long, and the railroad from Clinton to Cedar Rapids is between 81 and 82 miles long. The length of the original main line, located under the act of Congress of May 15, 1856, is about 344 90-100 miles as is shown by scaling the line down on its original main line.

The Cedar Rapids and Missouri River Railroad was completed in the summer of 1867, and the Lyons plug, so-called, was completed in 1868.

Of the lands certified under the grant, some few tracts, not exceeding in all probably 1,000 acres, have been relinquished as having been erroneously certified, through mistake in descriptin and other errors. It may, perhaps, throw light on the matters in controversy to state that plaintiff for the purpose of certification, claimed its lands under the grant from the east to the west, beginning at the east and going west for quantity; under the act of 1864, as it was understood by plaintiff, it became the duty of the Secretary of the Interior to reserve and cause to be certified and conveyed to the company, from time to time as the work progressed on the main line, out of any public lands belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right, or right of homestead settlement had not attached, and on which a *bona fide* settlement and improvement had not been made under color of title derived from the United States, or from the state of Iowa, within fifteen miles of the original main line, an amount of land equal to

that originally authorized to be granted to aid in the construction of the line.

The object of this reservation was to separate the grant lands from the public domain, and secure them from settlement under claims adverse to the grant. But the Secretary failing to perform his duty, the company from time to time caused selections to be made, in order that the matter might be brought directly before the Department, and to secure the benefit of the grants. In these selections, under the rulings and practice of the land office, only those tracts could be included which the Register and Receiver might deem vacant and to inure to the grant; all other tracts would be struck from the lists of selections, as presented, and therefore only those about which the land officers thought there was no doubt, would be included for certification; many tracts were thus struck out. These selections were regarded by the company as partial cleanings up of the grant. Some of those were made before the lands were earned or had inured, but were made to identify the lands as inuring to the grant, and thus secure them from conflicting claims. As a matter of fact, the lands thus secure them from conflicting claims. As a matter of fact, the lands thus selected were not certified until after the Governor's final certificate in 1867 had shown that the company had earned the lands and were entitled to them. No lands west of range 33 were claimed to have been earned by the company prior to this certificate of the Governor for showing the final completion of the road; no land west of this range were offered for sale prior to this certificate, nor did the company assume ownership over them, otherwise than by its efforts to get them certified under the grant. I find by

reference to our books that our first sale in Monona county was made February 15, 1868.

CROSS-EXAMINATION.

I have been assistant treasurer of plaintiff continuously since the summer of 1871, and have been stockholder of the company since April 13, 1872.

My supervision of the lands of plaintiff has arisen from my position partly as an officer of that company, and also because of my position as President of Iowa Railroad Land Company, which last company is the grantee of plaintiff; have been President of Land Company since the summer of 1872.

The Iowa Railroad Company was formed in June, 1869; the names of the officers for the first years after it was formed were: John I. Blair, President; W. W. Walker, vice-President and Treasurer; Chas. C. Walker, Secretary. Directors—John I. Blair, F. Nickerson, H. Williams, W. W. Walker, S. L. Thorndike, Oakes Ames, P. S. Crowell, D. C. Blair and Wm. T. Glidden. Executive Committee—John I. Blair, D. C. Blair, Wm. T. Glidden, Oakes Ames, F. Nickerson.

For Cedar Rapids and Missouri River Railroad officers were: John I. Blair, President; E. Nickerson, vice-President; W. W. Walker, Secretary, John I. Blair Treasurer. Executive Committee—John I. Blair, W. W. Walker, Wm. T. Glidden, F. Nickerson, Oakes Ames. Directors—Oakes Ames, P. S. Crowell, R. G. Hazard, J. M. S. Williams, J. I. Blair, C. E. Vail, D. C. Blair, Oliver Ames, F. Nickerson, Wm. T. Glidden, J. B. Alley, James Blair, W. W. Walker, J. F. Ely, H. Williams.

IOWA RAILROAD LAND COMPANY OFFICERS, 1871, VIZ.:

Horace Williams, Prest. W. W. Walker, Asst. Treas.
W. W. Walker, vice-Prest. C. H. Clark, Register.

C. E. Walker, Sec'y. W. P. M. Means, Reg. of Stock.
J. M. S. Williams, Treas.

EXECUTIVE COMMITTEE.

Horace Williams, Wm. T. Glidden,
John I. Blair, Jas. F. Wilson,
Jos. Nickerson.

DIRECTORS.

John B. Alley, C. A. Lombard,
Oliver Ames, Jos. Nickerson,
Wm. B. Allison, S. L. Thorndike,
John I. Blair, W. W. Walker,
D. C. Blair. H. Williams,
P. S. Crowell, J. F. Wilson,
Wm. T. Glidden,

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD OFFICERS FOR 1871:

Horace Williams, Prest. John Bertram, Treas.
F. Nickerson, Vice Pres. J. Van Deventer, Asst. Treas.
W. W. Walker, Sec'y D. P. Kimball, Register of Stock

EXECUTIVE COMMITTEE.

Horace Williams, J. I. Blair,
F. Nickerson, S. L. Thorndike,
Jos. Nickerson,

DIRECTORS.

John B. Alley, C. A. Lombard,
Oliver Ames, F. Nickerson,
John I. Blair, Jos. Nickerson,
D. C. Blair, S. L. Thorndike,
John Bertram, W. W. Walker,
J. F. Ely, H. Williams,
Wm. T. Glidden, J. F. Wilson.
C. B. Hazeltine,

IOWA RAILROAD LAND COMPANY OFFICERS FOR 1872.

J. Van Dexenter, Prest. — C. H. Clark, Reg. of Lands.
H. Williams, vice-Prest. — W. P. M. Means, Reg. of Stock.
G. T. Crandall, Sec'y. — P. E. Hall, Auditor.
J. M. S. Williams, Treas. — J. B. Calhoun, Commi'si'n'r.
J. Vandeventer, Asst. Treas.

EXECUTIVE COMMITTEE.

J. Van Deventer, — H. Williams,
J. I. Blair, — W. T. Glidden,
J. Nickerson,

DIRECTORS.

J. B. Alley, — C. A. Lombard,
Oakes Ames, — J. Nickerson,
Johe I. Blair, — S. L. Thorndike,
D. C. Blair, — J. Van Deventer,
P. S. Crowell, — H. Williams,
W. T. Glidden, — J. F. Wilson,
E. Johnson,

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD OFFICERS FOR 1872.

Horace Williams, Prest. — J. Van Deventer, Asst. Treas.
F. Nickerson, vice-Prest. — D. P. Kimball, Reg. of Stock.
P. E. Hall, Sec'y. — G. T. Crandall, Auditor,
J. M. S. Williams, Treas.

EXECUTIVE COMMITTEE.

Horace Williams, — F. Nickerson,
J. Nickerson, — J. I. Blair.
S. L. Thorndike,

DIRECTORS.

J. *B.* Alley, — C. N. Lombard,
Oakes Ames, — F. Nickerson,
J. I. Blair, — J. Nickerson,
D. C. Blair, — S. L. Thorndike,

J. F. Ely,
Wm. T. Glidden,
E. Johnson,
D. P. Kimball,
J. Van Deventer,
H. Williams,
J. M. S. Williams.

IOWA RAILROAD LAND COMPANY OFFICERS FOR 1873.

J. Van Deventer, Prest.
H. Williams, vice Prest.
G. T. Crandall, Sec'y.
J. M. Glidden, Treas.
J. Van Deventer, Asst. Treas.
C. H. Clark, Reg. Lands.
W. P. M. Means, Reg. Stock.
P. E. Hall, Auditor.
J. B. Calhoun, L. Commis'r.

EXECUTIVE COMMITTEE.

J. Van Deventer,
John I. Blair,
J. Nickerson,
H. Williams,
W. T. Glidden.

DIRECTORS.

J. B. Alley,
H. A. Ames,
J. I. Blair,
D. C. Blair,
P. S. Crowell,
W. T. Glidden,
E. Johnson,
C. A. Lombard,
J. Nickerson,
S. L. Thorndike,
J. Van Deventer,
H. Williams,
J. F. Wilson.

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD OFFICERS FOR 1873.

Horace Williams, Prest.
F. Nickerson, Vice Pres.
P. E. Hall, Sec'y.
J. M. S. Williams, Treas.
J. M. Glidden, Treas.
J. Van Deventer, Asst. Treas.
D. P. Kimball, Reg. of Stock.
G. T. Crandall, Auditor.

EXECUTIVE COMMITTEE.

Horace Williams,
J. Nickerson,
S. L. Thorndike,
F. Nickerson,
J. I. Blair.

DIRECTORS.

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Oliver Ames,
J. I. Blair,
D. C. Blair,
J. F. Ely,
Wm. T. Glidden,
E. Johnson,
E. P. Kimball,
C. A. Lombard,
F. Nickerson,
J. Nickerson,
S. L. Thorndike,
J. Van Deventer,
H. Williams,
J. M. S. Williams,
J. M. Glidden.

IOWA RAILROAD LAND COMPANY OFFICERS FOR 1874:

J. Van Deventer, Prest.
P. E. Hall vice-Prest.
G. T. Crandall, Sec'y.
J. M. Glidden, Treas.
J. Van Deventer, Asst. Treas.
J. B. Calhoun, L. Commis'r.
P. E. Hall, Auditor.
L. H. Clark, Reg. of Lands.
J. M. Glidden, Reg. Stock.

EXECUTIVE COMMITTEE.

J. Van Deventer,
F. L. Ames,
J. I. Blair,
J. Nickerson,
H. Williams,

DIRECTORS.

John B. Alley,
Oliver Ames,
F. L. Ames,
J. I. Blair,
D. C. Blair,
P. S. Crowell,
Wm. T. Glidden,
P. E. Hall,
E. Johnson,
J. Nickerson,
S. L. Thorndike,
J. Van Deventer,
H. Williams.

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD OFFICERS FOR 1874:

H. Williams, Prest.
F. Nickerson, vice-Prest
P. E. Hall, Sec'y.
J. M. Glidden, Treas.
J. Van Deventer, Ass't Treas.
G. T. Crandall, Auditor,
J. M. Glidden, Register of Stock

EXECUTIVE COMMITTEE.

Horace Williams,
F. Nickerson,
F. L. Ames,
J. Nickerson.
J. I. Blair,

DIRECTORS.

J. B. Alley,
Oliver Ames,
F. L. Ames,
J. I. Blair,
D. C. Blair,
F. G. Dexter,
W. T. Glidden,
J. M. Glidden,
E. Johnson,
D. P. Kimball,
F. Nickerson,
J. Nickerson,
S. L. Thorndike,
J. Van Deventer,
H. Williams,

IOWA RAILROAD LAND COMPANY OFFICERS FOR 1875.

J. Van Deventer, Prest.
P. E. Hall, vice-Prest.
G. T. Crandall, Sec'y.
J. M. Glidden, Treas.
J. Van Deventer, Asst. Treas.
J. B. Calhoun, L'd Commis'r.
P. E. Hall, Auditor.
C. H. Clark, Reg. of Lands.
J. M. Glidden, Reg. Stock.

EXECUTIVE COMMITTEE.

J. Van Deventer,
F. L. Ames,
J. I. Blair,
J. Nickerson,
H. Williams,

DIRECTORS.

John B. Alley,
Oliver Ames,
F. L. Ames,
J. I. Blair,
D. C. Blair,
James Blair,
P. S. Crowell,
Wm. T. Glidden,
P. E. Hall,
E. Johnson,
J. Nickerson,
J. Van Deventer,
H. Williams.

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD OFFICERS FOR 1875:

Horace Williams, Prest. J. Van Deventer, Ass't Treas.
F. Nickerson, vice-Prest G. T. Crandall, Auditor,
P. E. Hall, Sec'y. J. M. Glidden, Register of Stock
J. M. Glidden, Treas.

EXECUTIVE COMMITTEE.

Horace Williams, J. Nickerson,
F. Nickerson, J. I. Blair.
F. L. Ames,

DIRECTORS.

J. B. Alley, E. Johnson,
Oliver Ames, D. T. Kimball,
F. L. Ames, F. Nickerson,
J. I. Blair, J. Nickerson,
D. C. Blair, S. L. Thorndike,
James Blair, C. E. Vail,
F. G. Dexter, H. Williams
J. M. Glidden,

IOWA RAILROAD LAND COMPANY OFFICERS FOR 1876 AND 1877.

J. Van Deventer, Prest. J. B. Calhoun, L'd Commis'r.
P. E. Hall, vice-Prest. P. E. Hall, Auditor.
G. T. Crandall, Sec'y. C. H. Clark, Reg. of Lands.
J. M. Glidden, Treas. J. M. Glidden, Reg. Stock.
J. Van Deventer, Asst. Treas.

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J. I. Blair,
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James Blair,
P. S. Crowell,
J. Nickerson,
J. Van Deventer,
H. Williams.

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD OFFICERS FOR 1876 AND 1877.

Horace Williams, Prest.
F. Nickerson, Vice Pres.
P. E. Hall, Sec'y.
J. M. Glidden, Treas.
J. Van Deventer, Asst. Treas.
G. T. Crandall, Auditor.
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J. M. Glidden,
E. Johnson,
D. P. Kimball,
F. Nickerson,
J. Nickerson,
S. L. Thorndike,
C. E. Vail,
H. Williams,

The officers, directors and executive committee of the plaintiff have not held corresponding positions in the land company since the organization to the present time, although there have always been some members of the board serving on the other and some officers of one company officers of the other.

The Cedar Rapids and Missouri River Railroad, about Sept. 15, 1869, conveyed to the Iowa Railroad Land Company specific tracts covering all that had been certified, and also, by the same conveyance, what it might hereafter acquire from the United States or the state for

or on the account of the construction of its railroad.

Ques.—Here is a map, (here counsel shows witness accompanying map) examine it and state whether, since the organization of the Iowa Railroad Land Company, it has not sent to Monona county, and other counties in which it claims land, large numbers of similar maps every year, and whether the maps sent out each year were not marked in the same way as this one, except that in the first maps sent out some of the lands marked on this as sold were marked to indicate that they were for sale, and others marked on this as sold, marked to indicate that they were for sale. State in what respect maps previously sent to Monona county differed from this one. Mark the map exhibit "A," and make it a part of your deposition. State whether this map purports to be a map of all the land in Monona county that is claimed by said companies, as well as that not claimed by them or either of them.

Ans.—The map submitted is one sent out by the Iowa Railroad Land Company as an advertisement. (Commissioner shows witness map accompanying interrogatory. Witness returns same attached to his deposition, marked exhibit "A." Attached to testimony as exhibit "A" to deposition of J. Van Deventer.) (See tr. p. 398.) Many editions of it have been sent out and have been substantially correct as showing the lands the company was offering for sale. It has always intended to have the maps issued serve as a general guide to the lands and to have them include only those tracts to which the company had perfect title. Lands in dispute or only claimed, were not designated on the map as belonging to the company. Not having all the editions of the map on hand, I am unable to state in what particulars this one differs from any or all of the others. I have

knowledge of such maps having been sent out from time to time, as I have been an officer of said companies.

Ques.—State whether you, as an officer and agent of I. R. R. R. L. Co., kept yourself, as an officer and agent of the C. R. & M. R. R. R., posted as to what you were doing as an officer and agent of the former company.

Ans.—Any information I might have as an officer or agent of one of the companies, I presume, was available to me as an officer or agent of the other.

Ques.—If in answer to direct interrogatory six, you state that the plaintiff ever made any claims to any of the lands in controversy in Monona county, or any lands in even numbered sections in said county not certified to it by the Secretary of the Interior, and that such claim was made prior to the year 1874, you will state in what way, within your personal ~~cnowledge~~, ~~the plaintiff~~ prior to 1874, other than by sending out maps of the character before mentioned, plaintiff have apprized any of the defendants of such claim? Name the defendant in the case now pending in Monona county to whom such information was given prior to 1874? State when such information was given; how given; by whom, and how you know that it was given, as stated by you?

Ans.—My answer to the direct interrogatory does not require any answer to them.

Ques.—Attach printed copy of the circular letter of instructions issued by general land officers, under act of Congress of July 1, 1864—the circular of instructions approved June 6, 1866, by the Secretary of the Interior, relative to selection of land under railroad grants; attach a printed or written copy of such instructions marked exhibit "B?"

Ans.—I have not the circulars or letters of instruction called for by the question, and cannot therefore attach them.

The company appointed agents to make selections at different times; not having copies of all the list of selections I am unable to give the names of all agents so appointed—the lists themselves will show by whom they were made, and their authority to act.

Ques.—Does the following statement show the whole amount of lands selected by the plaintiff down to and including October 15, 1875, and the dates at which such selections were made, and the number of lands selected at each time, to-wit:

July 28, 1865, 4,395 acres.
August 15, 1866, 139,365 acres.
October 22, 1866, 191,438 acres.
August 29, 1867, 41,999 acres.
March 31, 1872, 2,258 acres.
July 26, 1872, 1,026 acres.
November 16, 1874, 859 acres.
December 12, 1874, 3,274 acres.
December 21, 1874, 4,704 acres.
October 15, 1875, 406 acres.

If the above is incorrect, state wherein, and give a correct statement of the times at which such selections were made and entered at the local land office, or lists sent to local land offices, or deposited therein up to Oct. 15, 1875, and the amount selected at such times.

Ans.—I am unable to state whether the lists of selections given above are correct or not, as I have not been able to find in the office of the plaintiff or of the I R. R. R. L. Co. copies of all the lists of selections made—even of all those stated in the question. The selections of July 28, 1865, mentioned in the question with a few exceptions, embrace lands already certified to the State under act of 1856.

Ques.—If plaintiff claimed any of the lands, the title

of which is involved in the suits now pending in Monona county, Iowa, prior to 1874, why were they not included in the lists of selections made before that time? Why did the company cease entirely from August, 1867, to March 31, 1872? Was it because the plaintiff got tired and wanted to rest or because they had selected as much as they thought they were entitled to under the grant of 1864?

Ans.—The company appointed agents in the different land districts to make selections in order that the grant lands might be identified; but no instructions were given to the agents to select any particular lands or class of lands. They selected lands concerning which there could be no conflict. I was not an officer of the company till 1871, and not in charge of the lands until 1872 and have not personal knowledge of the reason why these homestead lands were not selected earlier.

Ques.—Do you know how it happened that under the selections plaintiff did make, they escaped conflict with the homestead and other entries of defendants in the cases now pending in Monona county, Iowa, made between the passage of the June 2, 1864, act, and the time of making such selections? Do you think it merely accidental in every case.

Ans.—I do not.

Ques.—What, If any proceedings have been instituted by plaintiff in the department, or before the courts, to which either of the defendants in any of the suits now pending in Monona county, Iowa, were parties, and of which they had notice prior to 1874, to test the validity of such entries? Name the defendants who were made parties to such proceedings, and so notified of plaintiff's claim? and state when such proceedings were instituted, and the defendant notified if prior to 1874, and state be-

fore what tribunal said proceedings were had.

Ans.—I do not remember whether any of the test cases, which were submitted to the Land Department for the purpose of determining the validity of the homestead entries originally in Monona county, and at so early a day as to require notice to the defendant prior to 1874. The case of Johnson L. De Puy was decided by the Commissioner of General Land Office, July 16, 1874, and affirmed subsequently by the Secretary of the Interior. The test case of J. D. Havens, from Ida county, involving similar questions, was decided by Commissioner April 4, 1874, and affirmed by Secretary of Interior December following. The cases of George Castle, M. J. P. Jenness, H. W. Nobles were also test cases, and the entries were canceled September 11, 1874. Until these test cases were decided, and they hung for a long time, it was not thought necessary to begin on other cases.

I don't know of any suit being brought by the plaintiff, the Cedar Rapids and Missouri River Railroad, against the Des Moines River Company.

Ques.—Here is a letter purporting to have been written by you; examine it and state if you know in whose hand-writing it is; whether it was written by you, or by your suggestion or direction, and whether you saw it or new of it at or about the time it bears date or before it was mailed to the parties to whom it is addressed. Mark it exhibit "D," and attach it to your deposition? State whether the land to which you say in this letter you have not abandoned claim are not all the lands not embraced in the Courtright suit therein referred to, and which had been sold by the old Iowa Central Air Line Company under the grant of 1856, as alleged before the resumption by the state, and passage

of the act of the State Legislature conferring said grant upon plaintiff? State the source of title under which plaintiff claimed such land at the time of said letter? attach to your deposition a printed copy of the abstract of record filed by plaintiff herein either in the Supreme Court of the state, or in the United States in the Courtright case?

Ans.—Commissioner shows witnesses' letter attached, which witness returned, as part of his deposition, marked exhibit "D," which letter is as follows:

"OFFICE IOWA RAILROAD LAND COMPANY,

"CEDAR RAPIDS, IA., June 20, 1876.

"Messrs. Monk & Selleck, Ottawa:

"GENTLEMEN—Yours of the 13th in regard to n½ sw¼ and s½ nw¼, 11–84–42, is at hand.

"We will return to Mr. Dorothy the consideration money paid with interest thereon at 6 per cent. per annum on his reconveying to the company the same title which he obtained from it, and he can then, if he so desires, purchase the claim of the old Iowa Central Air Line Railroad Company. But we wish it to be distinctly understood that we do not and have not abandoned our claim to the lands, excepting only those actually embraced in the Courtright suit. The decision in that case affects, of course, only the lands named in it, and those were divided with Mr. Courtright before the result was known. All the other Air Line lands stand as before; and Mr. Moore's like the rest, after that case was in the Supreme Court, and when it was too late to get in other evidence, matters came to our knowledge which, we believe, would have materially changed the result as directly affecting the merits, had they been pleaded in the case. If Mr. Dorothy concludes it to be wise to hold under our title, we will defend him if suit is brought,

and if ultimately evicted, he could obtain compensation for his improvements under the occupying claimant law, and could undoubtedly make better terms than he is now offered. Negotiations were pending with the representatives of Zebulon Moore's estate for compromise of the title on the basis adopted by Courtright and others when the decision was announced and we regard our claim as being stronger now with the new evidence we have than when the Courtright case was made up.

"J. VAN DEVENTER, Prest.."

The letter was written by me, and speaks for itself. The title to Air Line Lands, so-called, is not involved in the present suit, and I am not now prepared to allow the attorneys for defendants herein to fish out in this suit matters of defence to suits of entirely different nature.

I don't know the distance from Anamosa to Cedar Rapids, on the D. & S. W. R. R. The contract referred to in the question between plaintiff and Platt Smith, attorney, for certain owners of a judgment against Iowa Central Air Line Company executed June 20, 1867, cannot be found. I presume it is on file with the papers in the suit reported in the 43d Iowa.

From the fact that the copies of all the lists of selections made are not in my office, I am not able to state the number of acres selected under act of 1864, in the Des Moines and Fort Dodge districts, nor when they were finally acted upon. Certified lists have been as follows, under the act of 1864:

DES MOINES DISTRICT.

April 20, 1869, 12,169 acres.
November 14, 1873, 480 acres.
July 25, 1874, 2,338.69 acres.
April 6, 1875, 3,485.36 acres.

ember 16, 1875, 406 acres.

ch 8, 1877, 6,598.59 acres.

il 9, 1877, 800 acres.

FORT DODGE DISTRICT.

il 20, 1869, 3,515.91 acres.

r't know with what claims the selections co-

.—Are not some of the lands mentioned in wer to direct interrogatory four as being within imit of the modified line of road, also within ıile limits of the original line? Do not the cross?

—The tracts are not duplicated in certifications; ver to the direct interrogatory was made up ified lists.

No road was ever built east of Cedar Rapids by the plaintiff, except the Lyons Plug, so-called. The Lyons Plug, so-called, extends from Lyons to Clinton, and is 2 41–100 miles in length.

If W. W. Walker ever made an affidavit in regard to the completion of Plaintiff's road in 1867, it is probably on file in the case in which it was made. I don't recall the matter now.

Cedar Rapids, Iowa, is between 81 and 82 miles west of Clinton, measuring both distances from the C. & N. W. R. R.

In the first batch of cases brought in Monona county by plaintiff there are 6,095 acres involved. In the second batch there are about 16,000 acres in all the counties. I have not the data made up as to this batch, so that I can give the precise number of acres in all, or those in Monona county. There are in the first batch in all the counties 20,291 acres involved. (Tr. pp. 375–111).

In the second deposition of J. Van Deventer, taken October 18, 1877, witness testified as follows:

I am the same James Van Deventer who before testified in this action.

Ques.—When did you or the officers of plaintiff or of Iowa Railroad Land Company first have knowledge or notice that improvements were being made and buildings erected upon the lands involved in this action, and in other actions of like nature now pending in the District Court of Monona county, Iowa, and how came you or the company by such knowledge?

Ans. No notice has been given to me or to any of the officers of plaintiff or of Iowa Railroad Land Company, so far as I know, of the improvement claimed to have been made upon any of the tracts embraced in these homestead suits; nor have I had knowledge of what improvements have been made and what buildings erected, or if any have been made or erected upon these lands, and so far as I know, the same is the case with the other officers of plaintiff and of the land company. It has been the custom of the office to have examinations made of the certified lands only, and the reports of the examiners have been confined to this class of lands. In fall of 1872, or early in 1873, I think, it was concluded to have a thorough examination made of the records at Washington, and at the local land office in the state, to ascertain what lands, if any, belonging to the grant, remains yet uncertified? These examinations brought to light the fact that many tracts within the limits of the grant were claimed adversely as shown by the records of the United States Land Office. As the examination progressed, the clear lands were from time to time selected, and test cases begun before the department to remove the adverse claims. The same process

of clearing up our grant is now continuing. From the existence of so many adverse claims being from time to time discovered, it was a matter of reasonable inference that improvements had been made on lands so claimed, but by whom or what tracts and to what extent I had and have no knowledge?

Ques.—You may state fully the object and purpose of conveying the lands of plaintiff to Iowa Railroad Land Company? What relation the later company sustains to the plaintiff and the method of conveying lands; also, as between the two companies, when the title is considered vested in the Iowa Railroad Land Company, explain these matters fully, and as an officer of both companies by whom the uncertified lands are now claimed, and in fact, owned?

Ans.—I was not an officer of either plaintiff or the Iowa Railroad Land Company at the time the grant lands were first conveyed and connot state the object and purpose of the conveyance, any more than that I have always understood it to have been an out and out sale of the property so far as then certified, with the agreement that the lands subsequently acquired by the plaintiff should be conveyed after their title had been obtained, so that conveyances could be made by specific descriptions. The records of plaintiff show that the first conveyances covered all the lands then certified and were by specific descriptions of the tracts conveyed. And, in furthermore of the agreement mentioned, it has been the custom of the plaintiff to convey, by specific description, to the Land Co., from time to time as lands have been certified. As between the two companies the legal title to the lands in controvery is considered as remaining in, and belonging to, plaintiff, until the lands have been conveyed by specific descriptions to the Land

Company. The uncertified lands belonging to the grant are claimed by the Railroad Company, the plaintiff in these suits, and are, in fact, owned by it. This is the relation between the two companies, as I understand it, as an officer of both, so far as the grant lands are concerned.

CROSS-EXAMINATION.

The Iowa Railroad Land Company is not connected in interest with any other company. Several other companies have their offices in the same building, and some of the officers of Iowa Railroad Land Company are also officers in some other of the companies. But the interests of each company are wholly separate and distinct. The property of each is separate; separate records and accounts are kept; separate conveyances are made by each company of its property, its own proper officers executing them. For the sake of economy and to prevent confusion, the land business is advertised in name of Iowa Railroad Land Company, and some other business pertaining to lands is transacted by it, the expense therefor being charged on the books of that company, in the first instance to "joint expenses," but are afterwards distributed between the companies, each paying its appropriate share. Each company pays its own officers, its own taxes, and all other expenses, except those which are pooled in the first instance for the sake of convenience and economy in management, as just stated. And the receipts form the property of each are kept separate and distinct from all others in all the books and accounts, each company having its own books. Each company has stockholders who do not appear in the other companies, and to all intents and purposes the interests of each are kept separate and distinct, although to a certain extent each is managed by officers, some, but not

all of whom, are officers in some or all of the other land or lot companies. Among the companies thus acting in harmony are the plaintiff, the Iowa Falls and Sioux City Railroad Company, the Sioux City and Pacific Railroad Company, the Blair Town-lot and Land Company, the Sioux City and Iowa Falls Town Lot and Land Company, the Missouri Valley Land Company and the Moingona Coal Company. In the corporation of plaintiff there were, in May last, 287 stockholders, of whom 35 were not stockholders in the Land Company; and in the Land Company there were about 264 stockholders, of whom 12 were not stockholders in the railroad company. Many who are stockholders in both companies do not hold the same amount of stock in each.

Ques.—If you have stated when the officers of plaintiff, other than yourself, first had knowledge that improvements were being made on the lands in controversy you will please infrom us how you are enabled to give the time when such persons acquired their knowledge upon the subject; do you know it from hearsa yor intuition?

Ans.—I don't know it at al'.

I did not know the status of the lands in controversy until it was brought to light by the investigations made for the purpose of clearing up the land grant finally, which I have answered in answer to direct interrogatory. I am not able to say when I first learned that these lands were not certified. I don't know that the department ever refused to certify these lands.

Ques.—Did you know that from August 29, 1867 to March, 1872, the plaintiff made no selections; and if so; when did it come to your knowledge?

Ans.—I was not aware that such was the fact until quite recently, my attention not being specially called

to it. I did not become an officer of the company until 1872.

Ques.—At the end of five years, during which plaintiff made no selections, what did you suppose the Government had done, or would do, with lands within the limits remaining unselected and uncertified?

Ans.—I am unable to recall any suppositions if I made any in regard to the matter.

Ques.—How long do you suppose the department ought to wait the selection of the lands claimed by plaintiff, after calling upon it to make such selections, before placing the land upon the market?

Ans.—The department never called upon the plaintiff to make selections, and I am unable to form any opinion upon the suppositious case presented by the question.

I don't recollect when I first learned of the passage of the homestead act. I have always supposed that settlement was an essential requirement under it. I believe the lands involved in the suit of plaintiff against settlers in Monona and other counties are all uncertified excepting two tracts in Monona county of 80 acres each, certified April 19, 1877. These are e ½ se ¼ and w ½ se ¼, 2, 85, 43.

Ques.—Do you think, or are you advised, that it is important to distinguish between the lands certified within the 15-mile limits of the original line and those within the 20-mile limits of the modified line? If you so think, or are so advised you will now state why, in your former deposition, you did not answer squarely the cross-interrogatory in which you were asked to state whether some of the land referred to in your direct examination as being within the 20-mile limits of the modified line was not also within the 15-mile limits of the original line.

Ans.—I resent the imputation cast in the interrogatory that I did not answer squarely anything asked for, so far as the form of the interrogatory would permit me to understand its scope and object. I have not been advised that it is important to distinguish between the lands certified within the different limits named in the grant, nor do I think such distinction of any importance.

Ques.—You may state whether the following described lands are not included in the lists certified as being within the 20-mile limits of the modified line, to-wit: All of sections 2, 4, 6, 8, 10, 12, 14, 18, 20, 22, 24, 26, 28, 30, 32, 34 and 36 in town 85, range 35; all of section 4, 6, 8, 10, 14, 18, 20, 22, 24, 26, 28, 30, 32, 34 and 36 in t. 85, r. 34; all of sections 2, 4, 6, 8, 10, 12, 14, 18, 20, 22, 24, 26, 28, 30 and 36, t. 85, r. 36; all of sections 10, 14, 20, 22, 24, 26, 28, 30, 32 and 34, tp. 86, r. 36; all of sections 12, 18, 20, 30, 34 and 36, t. 86, r. 37; all of sections 14, 18, 24, 26, 30 and 36, t. 87, r. 37; all of sections 2, 4, 6, 8, 10, 14, 18, 20, 22, 24, 26, 28, 30 and 36, t. 86, r. 38; all of sections 14, 20, 24, 26, 30, 32 and 34, t. 87, r. 38; all of sections 2, 4, 6, 8, 10, 12, 14, 18, 22 and 24, in t. 86, r. 39; all sections 4, 6, 8, 18 and 20 in t. 84, r. 42; all of sections 12, 14, 20, 22, 24, 26, 28, 30, 32 and 34, t. 85, r. 42. Are these lands not also within the 15-mile limits of the original line? What portion of them are outsids of the 15-mile limits or not certified as being in the 20-mile limits aforesaid?

Ans.—The lands mentioned appear from the certified map showing the limit of the grant to be, some of them within the six and the rest within the 15-mile limits of the original grant, and they are also within the 20-mile limits of modified line. The certified lists describe them "as being the vacant and unappropriated lands granted by the 4th section of said amended act

within 20 miles on each side of the modified line of said railroad," etc.

Ques.—Don't you well know that all or nearly all the certified lands under the grant of 1864 within the 20-mile limits of the modified line were certified as being within these limits regardless of whether they were within the 15-mile limits of the original line? Have you or can you procure the report of the Register of State Land Office for the year 1871? Is the list of lands purporting to be the list within the 20-mile limits, Sioux City and Council Bluffs District, approved by Secretary of Interior, July 18, 1868, and beginning on page 148, and ending on page 160, of said report, a correct list of lands in said districts, certified or approved by the Secretary as of said date, and as being within the 20-mile limits? If not, wherein does it differ from the original list? Attach a copy of said report of 1871; mark it exhibit "A." If you don't choose to compare it with the lists, attach a copy of all lists certified under act of June 2, 1864, as being within the 20-mile limits, marked exhibit "B," and make it part of your answer.

Ans. (Report of 1871, attached to the commission shown to the witness, and his attention called to the pages designated in the interrogatory which report is herewith returned, marked exhibit "A," and pages designated being marked as directed). This report is attached to the transcript as exhibit "A," to deposition of J. Van Deventer. (Tr. pp. 463). Witness then answers. of the lands certified under the act of 1864, 226,263 acres are certified as within the 20-mile limits of the modified line, many of them being within the 15-mile limits of the original line also. The map to be produced on the trial will show the location of these lands with reference to the distance line, from the line of road.

The report of the Register of State Land Office on the pages named contains an aggregate of 201,072.77 acres, which quantity corresponds with the quantity of two certified lists of the date named, and I presume the specific tracts named in the report are correctly given. My answers have been partly from personal knowledge and partly from information obtained from various sources, among which have been the records of the companies' official correspondence and transactions of business in relation to the matters treated of. When not on personal knowledge, I have generally, I think, designated my source of information in the replies. (See Tr. pp. 442–462).

Plaintiffs next offer in evidence deposition of Wm. T. Steiger, who testified as follows:

My name is Wm. T. Steiger, of lawful age; reside in Howard county, Md. I resided from December, 1833 to November 1864, in Washington city, when I removed to Howard county.

My official connection with the Cedar Rapids and Missouri River Railroad Company has been from January 20, 1865, as assistant agent of Messrs. Oakes Ames and J. I. Blair, and the agent and attorney to the present time under a subsequent engagement with the Iowa R. R. L. Co., my compensation being a salary.

Ques.—Give a full and complete narrative of all you have done as agent of said company in the following respects: First, To procure the certification of lands granted it under the act of Congress of June 2, 1864. Second, To resist homestead pre-emption and other entries of land claimed by or granted to the plaintiff. Third, What lands you have claimed for plaintiff to be within the limits and inuring to the company under the grant and when and how you made such claim?

Ans. 1st—On the 20th of January, 1865, Oakes Ames and J. I. Blair being present in Washington, addressed a letter to the Interior Department, filing their credentials as agents to represent the company, and requesting that I might be recognized as their assistant agent at Washington. (Exhibit "A," attached to this deposition). I immediatly took charge, and have since been recognized as such; also as agent and attorney of the Iowa Railroad Land Company. Our first efforts were to procure the issue of evidence of direct title of the lands previously approved to the state, under the act of 1856, for the Iowa Central Air Line Road, predecessor of the Cedar Rapids and Missouri River Railroad, which, for reasons assigned, were denied, but resulted in furnishing the company with certified copies of said lists. It would be a long history, beyond the limits of this answer, to detail all the efforts which have been since made to obtain the certification of the lands yet due the company under act of 1864, spreading over a voluminous correspondent of some 12 years. I can, therefore, only give prominent portions, and that chiefly relating to the lands in Sioux City and Council Bluffs Districts, where the great bulk of the land north of the 20-mile line in controversy, are situated, including those in Monona county. I find that the first selections were made by authorized Iowa agents of the company, and the land approved to the road under the act of 2d June, 1864, as follows, to-wit:

SIOUX CITY DISDRICT.

By Thos. J. Stone, selected October 22, 1866,
even numbered sections north of 20-mile
line, corrected.....125,649.64
South of 20-mile line..... 64,655.66

190,305.30

Approved lists in Nos. 45 and 46, July 18, 1868.

COUNCIL BLUFFS DISTRICT.

By C. H. Street, selected August 15, 1866, even numbered south of 20-mile line, corrected 136,416.41
Approved in list No. 47, July 18, 1868.

FORT DODGE DISTRICT.

By Dawley, about some time in 1865–66, under act of 1864, even sections, 20-mile limits, 3,515.91
Approved in list No. 60, April 20, 1869.

FORT DES MOINES DISTRICT.

By F. G. Clark, about some time 1865–66, under act 1856, list 57, 6-mile limit, as corrected 916.10
List 58, 15-mile limit as corrected 1,595.40

2,511.50
Under act of 1864, 20-mile limit, as corrected 12,169.06

14,680.56

Making in the aggregate approved 344,918.18

And comprising the bulk of the lands granted by the act of June 2, 1864. I think it was shortly after the approval of the selections of Messrs. Dawley and Clark, to-wit: April 22, 1869, that by an arrangement with the company I took up the above mentioned original lists of selections with a view to examine and revise the whole grant, and found by a careful and laborious comparison, with the General Land Office tract books, that quite a number of vacant tracts inuring to the road in all the four districts had been omitted, and that as a rule the local officers had disallowed and struck out all lands enumerated by standing homestead or preemption entries, or other claims, whether valid or not, thus leaving them for a future adjudication, and I at

once prepared lists of selections of such lands for each district, the originals of which lists are still in my files and in my possession, when, by a letter received from J. I. Blair, dated June 9, 1869, (see exhibit "B," hereto attached), my relations to the company to take effect 1st of June, were materially changed, in consequence, I believe, of some change in the ownership, or at least the control of the grant by consolidation with Iowa Railroad Land Company, which for some time interrupted further proceedings on my part as to selections until, I think, in May, 1870, when I took up the old lists again, and in course of my examination some time between May and September, 1870, I found that all the vacant lands in the even numbered sections north of 20-mile line, Council Bluffs District, which had been all included in my list of 1869 for selection, had been restored to market in 1867, and this accounted for the numerous homestead entries, found when preparing my list in 1879.

This action was a surprise to me, since according to my construction of the act of June 2, 1864, at that time, such lands all inured to the road, and took effect at the date of the law. It is true, I had seen the public printed notice of restoration No. 711, but that only gave aggregates (see exhibit "C" attached hereto,) and I had no means of knowing the particulars, except from the office lists, which I afterwards learned had been sent to the land officers, but which I had never seen, and which have since been repudiated by the Department in its rulings as "erroneous and illegal," so far at least as they restored the road lands in the Council Bluffs District and Monona county. It was simply a mistake of the clerks who prepared the lists of restoration in examining the order of the Commissioner and the Secretary of May 30, and June

2, 1866, (see exhibits "D" and "E,") which expressly directed the restoration of the lands to market "so as not to interfere with the grants of 2d June and May 12, 1864." Therefore in preparing my lists for selections about Sept. 20, 1870, (as noted on the old lists,) I concluded it would be useless to select any of the lands in even numbered sections *north of 20-mile line*, until the error of their restoration to market, could be inquired into and corrected, for, of course, if selected, being in conflict with numerous standing homesteads and pre-emptions made under the public notice, the land officers would not allow them. I erased them from my list as shown by the red lines on the answered abstract therefrom with a map (exhibit "F," attached,) which is an exact copy from my old original Council Bluffs list, including the pencil momoranda in the margin of conflicting homesteads considered invalid, being initiated after June 2, 1864, and, as will be seen, including the homestead of Benj. Herring on e½ of nw¼, section 20, tp. 84. r. 46, supposed to be the defendant in this suit.

As soon as practicable I put the new lists in form, and after some delay for the reception of the usual certificates of my agency to be attached thereto, which did not reach me until March 5, 1871, I executed and forwarded them to the company March 18, 1871, and I find that the Council Bluffs list, covering originally 11,924 20-100 acres after various office delays was approved as corrected September 2, 1872, after being reduced to only 960 acres clear lands, most of the differance being conflicting entries for future adjudication. As showing the inconsistency of the clerks who prepared the lists of restoration of 1867, whilst they included in the lists the lands north of 20-mile line, in Council Bluffs, District, a large body of the very same character of lands in the

Sioux City District, selected by Mr. Stone, as above stated, were approved to road, July 18, 1868, to-wit: the 125,649 64-100 acres on even numbered sections north of 20-mile line, confirming my impression that such lands were not restored by the public notice. From all the foregoing it will be seen that up to September 2, 1872, the date of approval of the clear lands, found in my selections of March 18, 1872, no time was lost by the company or its agents in their efforts to secure the benefits of the act of 1856 and 1864, especially in the Council Bluffs Districts and Monona county, as the voluminous correspondence of the officers with the Department, could it be introduced here, would show still more conclusively that, in fact, the delays that did occur, as will be seen by comparsion of the above selection and approval, were attributable to delays of official executive action and furthermore, that the lands incontroversy north of the 20-mile line in Monona county were persistenly claimed by the company and its agents both before and after the fact was known to them that they had been inadvertently restored to market in 1867.

Then after a protracted correspondence in regard to conflicting claims of every description, among them claims to these lands north of the tweny-mile line in the Council Bluffs District and Monona county, and after repeated decisions of the Secretary of Interior in several appeal cases, awarding lands of this character to the road on the principles claimed by the company, and some of which were selected by me and approved November 16, 1875, (I allude to the case of J. D. Havens, T. L. DePuy, Needles, Jenness and Castles (a printed argument in the case of Gurdon Colton (see exhibit "G" attached to tr. p. 525,) it was considered the proper time to bring all the claims of this character regularly before

the Department for adjudication and final action. I therefore prepared for selection from my various memoranda a complete list of them, including other scattered tracts; that for Des Moines, including Council Bluffs District, aggregating 26,091.73 acres, which I transmitted to Iowa December 13, 1875, and they were, after making some additions, regularly selected and filed by the company's agent, Wm. Ragan, in due time, and have since been reported by the Registers and Receivers, with their action thereon. As was to be expected these officers disallowed and struck out all tracts covered by standing homesteads, only allowing and certifying to the road tracts clear of such incumbrances, and with exceptions the bulk of the lands thus stricken out, now stand before the Department for final adjudication, after the test cases of Colton, and others, now before it on appeal, involving also the construction of the act of Congress, approved April 26, 1876, shall be disposed of, as will more fully appear from my printed argument, and that of Jos. F. Wilson, in the case. (Exhibits "G" and "H" attached to trascript pp. 525–6.)

2. In addition to what already has been said under the first head in regard to the resistance made to homesteads, pre-emption and other claims upon the road lands, my records show that from January 29, 1855, when I took charge, up to the present time, it had been continuous battle, and that the attention of the Commissioner was called early to the subject.

To begin at the foundation, the Commissioner, under date June 16, 1864, (see exhibit "I," p. 7, attached to tr. p. 527, being Burdette letter, ab. p. 77,) withdrew from sale or entry, pre-emption or homestead, lands granted by the act of 1864, and in his report to the Secretary of June 25, 1864, (exhibit "I," p. 7, pp. ab. 77,)

held that both the odd and even numbered sections passed to the grant, but by instructions issued August 25, 1864, (exhibit "I," p. 8, attached to tr. p. 370,) he modified his previous instructions of the 16th of June, so as to allow pre-emption and homesteads on the withdrawn lands, which last instructions, as the act of June 2, 1864 took effect at the date as since uniformally admitted, we considered were without warrant of law. Besides, the whole of these lands had already been withdrawn May 15, 1856, and stood reserved from sale or pre-emption on June 2, 1864, by which they were regranted, and it would seem were beyond the power of the executive office to make any other disposition of them. Under these circumstances as early as May 8, 1865, Messrs. Walker, Ames and Blair, representing the railroad company, addressed a joint letter to me, to be submitted to the Commissioners (see exhibit "K," ab. p. 52–53,) which was submitted with my letter of May 12,(see ex."L," ab. p. 54) calling special attention to the subject, and repeated in my letter August 22, (see exhibit "M," ab. p. 54,)and the Commissioner issued the counter instructions of June 7, 1865, [see exhibit "I," p. 11, attached to tr. p. 527, ab. p. 77.] At this time it must be borne in mind that the map of the amended line had not yet been filed and the lateral limits laid down, hence the terms "within the additional 5-miles" in the instructions. It will also be observed that they are made retrospective as to any claims or entries initiated after June 2, 1864 the date of the granting act—which appears to be the first official announcement that this grant took effect at the date of the law, which has since become *res adjudicata*, and governed in the rulings of the Department as directly stated in Commissioner's report of January 19, 1876, in reply to Addison Oliver, printed copy annexed,

(exhibit "I," attached to tr. 363–372, ab. pp. 77,) in which he also proclaims that the restoration of the lands north of 20-mile line was "erroneous and illegal," and otherwise affirms all that railroad company ever claimed. Again, the Commissioner, on the complaint of Isaac Cook, then Land Commissioner of Cedar Rapids and Missouri Railroad, that the land officers were still permitting numerous invalid pre-emption entries upon the road lands by parties who were devastating the timber, etc., issued under date of September 20,1866,(see exhibit "N.") general instructions to all the Registers and Receivers, in substance, directing them to discontinue the practice complained of, to report in each case, and to notify the parties that their entries would be canceled.

It cannot be expected of me in this answer to go into detailed statement of all the numerous claims alleged on the road lands. If I were to do so, the record would show a long list of such which have been discussed and decided from time to time, of claims improperly allowed by the land officers, and canceled in the General Land Office records, and that, as heretofore remarked, that it has been a continuous battle, as may also be inferred from the foregoing instructions and exhibits, 3d head. As explained in my answer under first head, when constructing my first old list for selection in 1869, and before I discovered that the lands north of 20-mile limits had been restored to market in 1867, I included, as will be seen, all such lands in my list, thus claiming them as inuring to the road, according to my construction of the law. Whatever doubt I may have entertained before, I had none then; after a careful examination of the provisions of the fourth section of the granting act, which in express terms grants for it the public lands within the original main line of the grant of May 15, 1856, and

second indemnity lands from any other available public lands within 20 miles of the amended line of the route.

Likewise by Mr. Stone's selections in the Sioux City District in 1866; heretofore mentioned approved to the road in 1868, they were successfully claimed for the company at that early day.

CROSS-EXAMINATION.

As stated in my examination in chief, I commenced service and was recognized as assistant agent for the Cedar Rapids and Missouri River Railroad Company, on January 20, 1865, until 1st of June, 1869, but although my relations to the company was then, as stated, somewhat changed. I still corresponded with the officers without intermission until some time in 1870, when I think, some change was made in the management of the land grant by consolidation with Iowa Railroad Land Company, from which time I become the agent and attorney at Washington for that association, and am now, for all land matters of the roads under its control, including the Cedar Rapids Road; my duties have been varions in prosecuting its land claims before the Department in Washington and sometimes before Congress. I have also selected some of the lands inuring to the Cedar Rapids Road, but not to the other roads of the association. During nearly the whole of the same period I have been agent and attorney with similar duties for the Chicago, Rock Island and Pacific, and until very recently for the Burlington and Missouri Road; also, for a short time, for the Dubuque and Sioux City; and am at present in the employ of all the roads named, except the Burlington and Missouri. I have formerly acted as agent and attorney here for several roads in other states with similar duties.

Ques.—State what efforts you made to ascertain

whether the Department was keeping the even numbered sections open for homesteads and pre-emption entry within the 15- mile limits, and whether you knew such entries were being allowed outside of the 20-mile limits and within the 15-mile limits? Give a copy of any letter from you to the department remonstrating against such entries written snbsequent to yours of May 12, 1865? Attach copies mark "A," "B" and "C" of all such letters, and make them part of your deposition?

Ans.—In my answer in chief to the first head of interrogatory, I have already explained when and how I learned of the restoration to market of the lands referred to, and of the interfering entries made thereon. I cannot think of anything more to add on that head: the only remedy was to procure counter-instructions, which was done as declared under the second head of fourth interrogatory in chief.

Qus.—State when you first learned of the letters of the Commissioner of the General Land Office to the local land office relative to the homestead and pre-emption and private entries, dated August 25, 1864, August 23, 1866, September 21, 1866, and notice and letter of July 5 and 6, 1866, referred to in Burdette letter? You may also state what efforts you made to ascertain what action was being taken by the Department relative to the adjustment of the plaintiff's grant, and the allowance of homestead and pre-emption entries on the even numbered sections within the 15-mile limits? State fully—not in a general way—but explicitly and in detail, giving dates; state whether you were in Washington or in Iowa at the time, and attach copies of any communications sent by you to the Department after the one of May 12, 1865, and of any response thereto by the Commissioner or Secretary—attach them marked for identification?

Ans.—In regard to the foregoing questions relating to the letters mentioned, it will be found on reference, that I have already answered under the heads of the fourth interrogatory in chief. The effect of the instruction of Aug. 23, 1866, was to protect the even numbered sections inuring to the road in the Sioux City District north of the 20-mile line, which were selected by Mr. Stone in 1866, and were subsequently approved to the road, as explained in my answer in chief; all my acts for the company have been done in Washington—none in Iowa.

Ques.—Is it not a fact that none of the land involved in this suit or others of like nature now pending in Monona county, Iowa, were included in any list of selections made by plaintiff or its agents prior to 1874? If you say it is not a fact, give the number and date of the list in which any part of it was included, or all of it, as the case may be, and attach a copy of such list or lists marked for identification?

Ans.—As explained in my answer to the fourth interroggatory in chief, first head, all the land inuring to the road of the character mentioned were listed by me in 1869, shortly after the selections of the Iowa agents were approved by the Department, and included the lands inuring to the road in Monona county. I have given an abstract with a map from my original list, including B. Herring's entry, and explained why they were struck and their present status.

I have known of the act of July 1, 1866, and instructions of May 30, 1866, from the dates; the second section provides for change of route of one of my agency roads, the B. & M. R. R. R.—the first section, as I understand it, only provided and regulated the location fees of the officers, and the instructions changed the old practice,

by requiring the lists of selections for railroads to be filed with the Registers and Receivers. The remaining questions in this interrogatory, I believe, I have fully answered under the fourth interogatory direct, First head, As to my source of imformation, it is derived from the orignal lists and papers in the General Land Office and partly from my own memoranda and correspondence with officers of the road.

Int. 6.—What, if any, proceedings were instituted in the Department or elsewhere, prior to 1874, to which any homesteader or pre-emptioner was a party, and of which he had notice prior to 1874, to test the validity of his entry on an even numbered section, on the ground that it conflicted with the grant of 1864? Specify each proceeding instituted prior to 1864? Give names and residence of parties having notice prior to that year, the counties in which each party resided, and in which lands entered by him was situated, the date at which the proceeding was instituted, and of which notice was given to the party—the character of the proceedings, and how and when and by whom determined, and the exact source of yonr information?

Ans.—My answer under the fourth interrogatory in chief will show what proceedings were had, and as to particular cases I refer to printed arguments, exhibit "G," attached to depositions of Wm. T. Steiger (see tr. p. 525), and my answer under the second head. I have no copies of notices to settlers, and can only infer their residences from the tracts claimed.

C. Int. 7.—Give the names of all homesteaders and pre-emptioners in Monona county, Iowa, whom you have notified of your claim to the lands entered by him? State how and when such notice was given? Confine your answer to any notification prior to 1874,

and state only what you did personally, and not what you may have heard was done from somebody else?

Ans.—As stated in my last answer, I have given no such notices—it is not my province. Such notices sent from this point would be from the General Land Office, as in other contested cases.

My answers herein are all from personal information, unless otherwise indicated, and from originals and documents in my possession, including my press copies taken from the originals.

C. Int. 9.—If in answer to any of the foregoing interrogatories you say that any of the land in controversy, either in this suit or others of a like nature now pending in Monona county were included in any selections prior to 1874, you may state why, if you know such tracts were not entered upon the plats and tract books of the local land office and certified to the plaintiff? Give ground upon which certification was refused and your source of knowledge, and copy of lists containing such tracts with the endorsements thereon properly marked?

Ans.—All my examinations were made on the General Land Office tract-books in Washington. I have never seen the plats and tract-books of the local land office in Iowa; therefore, I am unable to answer the question. (Tr. pp. 464–514).

Exhibit "A," referred to in deposition of Wm. T. Steiger and attached thereto:

"WASHINGTON CITY, January 20, 1865.

Hon. J. P. Usher, Secretary of Interior:

"SIR:—I have the honor to enclose herewith two certificates of the Governor of Iowa, one for 20 miles and the other for 40 miles making in all sixty miles of completed railroad in conformity to the laws of the

state of Iowa and the laws of Congress, commencing at Cedar Rapids, Iowa, and running nearly due west following the 42d parallel of latitude, and for which we are entitled to receive certain lands of Congress. We would state that we have 120 miles of said road constructed, but we present certificates for only sixty miles at this time. The company desire to place these documents on file, and have all things put in shape to enable it to receive and dispose of the lands due them for *forty miles* of said road at the earliest period. I enclose likewise the resolutions of the Board of the Cedar Rapids and Missouri River Railroad Company, appointing Hon. Oakes Ames and myself agents to procure the same.

"I am, very respectfully, your obedient servant,

"JOHN I. BLAIR,"

For himself and OAKES AMES.

We desire Mr. Steiger, of Washington, to act as our agent, to assist, and request that he be recognized.

(Tr. pp. 516–518.)

Exhibit "B," attached to deposition of W. T. Steiger.

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD CO.,

"CEDAR RAPIDS, IOWA, Jan. 9, 1869.

"To Wm. T. Steiger, Washington City, D. C.:

"Dear Sir—This company has arranged to dispose of their lands to a land company, and therefore will not require your services any longer for this company, so far as land matters are concerned. It may be that the land company may require your assistance. I shall recommend you to their favorable consideration. When I come to Washington I will see you on the subject of the lands of our other patent.

"Yours, etc. JOHN I. BLAIR,

"Prest. C. R. & M. R. R. R. Co."

(Tr. p. 518.)

Exhibit "C," attached to deposition of Wm. T. Steiger:

"NOTICE, No. 711.

"*For restoring to market certain lands heretofore withheld from ordinary private entry for the adjustment of railroad grants in the State of Iowa:*

"Notice is hereby given, that public lands which have heretofore been withheld from ordinary private entry for the adjustment of railroad grants in the State of Iowa, to the aggregate quantity of 641,430.15 acres, held at the double minimun price of $2.50 per acre, and 1,627,014.46 acres held at the ordinary minimun of $1.25, will be restored to market, as follows, viz: On Monday the 17th day of September, 1866, at the land office at Fort Des Moines, 1,772.41 acres at $2.50 per acre, and 12,385.91 acres at $1.25 per acre.

"On Monday the 1st day of Oct., 1866, at the land office at Council Bluffs, 18,821.43 acres at $2.50 per acre and 2,365.98 acres at $1.25 per acre.

"On Monday the 15th day of Oct., 1866, at the land office at Fort Dodge, 102,907.99 acres at $2.50 per acre, and 145,906.62 acres at $1.25 per acre.

"On Monday the 29th day of Oct., 1866, at the land office at Sioux City, 517,928.32 acres at $2.50 per acre, and 1,466,355.95 acres at $1.25 per acre.

"Lists descriptive of the above lands by legal subdivisions will be retained in the respective land offices above mentioned for the inspection of parties wishing to purchase.

"Given under my hand at the city of Washington, the 15th day of July, 1866.

SEAL.

"J. M. EDMUNDS,
Com'r of Gen'l Land Office.

(Tr. p. p. 519.)

Exhibit "D," attached to deposition of Wm. T. Steiger, is a letter from Commissioner to Secretary of the Interior, dated May 30, 1865, and is hereinbefore set out in the abstract (p. 52-3.) as exhibit "K," attached to Burdette letter.

Tr. pp. 519–522.)

Exhibit "E," attached to deposition of Wm. T. Steiger, is heretofore set out in the abstract (p. 42–43,) as exhibit "L," of Burdette letter.

[Tr. p. 523.]

Exhibit "F," referred to in deposition of Wm. T. Steiger, is attached to transcript [see p. 524,] and is a list of lands made up as inuring to the company under said grant by agent of railroad company, and includes the lands of defendants, Benjamin Herring and Daniel T. Cutler, together with a map therewith, which list and map is referred to and will have to be examined in transcript.

Exhibits "G" and "H" referred to by Steiger, are the arguments of Steiger and Wilson in land office cases before Department [see tr. pp. 525-6,] and exhibit "I," in the Burdette letter herein before referred to with exhibits. [Found in ab. p. 77, tr. p. 527.]

Exhibit "K," attached to deposition of Wm. T. Steiger, is as follows:

"C. R. & M. R. R. R.,

"Office of Secretary and Treasurer,

"Cedar Rapids, Iowa, May 8, 1865.

"Wm. T. Steiger, Esq., Agent at Washington, D. C.

"Dear Sir—I have learned that a large number of pre-emption claims are being made at the Fort Des Moines Land Office, to lands included in the grant to this company; many of which claims are entirely invalid, as we can clearly show, if we have a little time to furnish

proof. I have incidentally heard of the following cases, and can give abundant proof of the facts. I will state each case:

"Wm Pitcher claims nw¼ sec. 19, tp. 84, r. 26; he has an improved farm adjoining this land, but has no improvements on this 40 acres and never had any.

"Chas. Houghton claims lot 8 sec. 23, tp. 84, r. 27; has not lived on the land but two years, and has made no improvements.

"McMillen claims e½ ne sec. 7, tp. 83, r. 26; has lived on the land but two years, and made no improvements.

"Mrs. Milbourn claims se of se sec. 11, tp. 83, r. 27; deserted her claim and gone for one year or more.

"Herbert Baltin, sw of sw sec. 3, tp. 84, r. 27; lives on adjoining land but has no improvements on this and never had.

"Jesse Hall—Cannot now give descriptton—facts same as in last above case.

"Frank Robinson—Cannot give description; bought 40 acres of the State of Iowa, while the land was supposed to be Des Moines River grant, and made improvements, now files a claim for the same 40 acres, and also the adjoining 120 acres. He has no improvements on the 120 and never had.

"Allison—Have not yet got description; has been on land less than two years.

"I hear there are various other cases which I have not yet the facts in regard to.

"We would like to have you report to us all the applications for pre-emptions which have been received by the Department at Washington, and have not yet been acted upon; and also notify us of any others which may hereafter be presented, and also request the Commissioner to delay any decisions upon these cases until

we can have a reasonable time to furnish proof that such claims as I have named are invalid.

"We understand that a person to make this claim valid must have gone onto the land prior to the date of the filing of the line of the road, must also have made improvements and resided on the land ever since, not having sold or transferred his claim. Is this correct?

Yours, truly, W. W. WALKER,

(Tr. pp. 528–530). "Vice-President and Secretary."

J. I. Blair for himself, and Oakes Ames, agents, C. R. & M. R. R. R. Approved.

Please refer this matter to the Land Commissioner at Washington.

Exhibit "L," attached to deposition Wm. T. Steiger, is a letter from Steiger to Commissioner, May 12, 1865, is hereinbefore set out as exhibit "15," on pages 50 and 51 of this abstract (Tr. p. 530).

Exhibit "M," attached to deposition of Wm. T. Steiger, is as follows:

WASAINGTON, August 20, 1865.

"Hon. J. M. Edmunds, Commissioner Land Office:

SIR:—Since your circular of the instructions of 7th of June, 1865, to Registers and Receivers of Iowa, forbidding the entry for homesteads and pre-emptions of lands inuring to three of the most southern railroads therein enumerated, which was predicated on my application of the 12th of May, 1865, also ordering the suspension for future examination and adjudication of any interfering entries of this character, I unsterstand that quite a number of such entries have been reported by these officers in the month of May and the subsequent monthly returns.

"I am now advised that the Cedar Rapids and Missouri River Railroad Company have procured testimony ma-

terially affecting these interfering claims, some of which have been placed in the hands of Hon. M. Pomeroy, who will file it in the General Land office, if he has not already done so. I therefore respectfully request that the suspension may be continued for the present, and that I may be advised whenever the cases are taken up, and that in the meantime, I may be furnished with a list of the claimants showing the tracts claimed, the names of the witnesses and the dates of settlement, improvements and occupancy.

"With your permission I will prepare the lists so as to save the time of the clerks.

"Respectfully, your obedient servant,

(Tr. p. 532). "WM. T. STEIGER, Agent, etc."

Exhibit "N," attached to deposition of Wm. T. Steiger, is a letter from Commissioner to Registers and Receivers, dated September 20, 1866, is hereinbefore set out as exhibit "20" in this abstract p. 56-57. (Tr. pp. 534-5.

Plaintiff then offers in evidence deposition of John I. Blair; viz: Name is John I. Blair; over 73; reside at Blairstown, N. J.; am president of bank; president of three railroads; director in iron and steel mills; director in about ten railroads, and attending to my private business, besides I was always director and a member of the executive committee and president of the C. R. & M. R. R. R. for about five years. I had mainly charge of the location of the new or modified line, and of the construction of the plaintiff's road to the Missouri River; I also took charge in the main of the certification of the land granted to the road.

The first seventy miles of said road was located to Marshalltown in 1863; to Nevada, Story county, some time in 1864. From Nevada west to a point at or near Missouri Valley (so-called,) the line was located from

time to time prior to the 19th day of June, 1865, and from Missouri Valley (so-called) to the western terminus of the road on the Missouri River, at a point opposite Omaha, from time to time during the year 1866. The location of the modified line of the road was made under the act of June 2, 1864, and was for the purpose of forming a connection of the Iowa branch of the Union Pacific Railroad. The railroad was ready for business in the winter and spring of 1867, but was not completed in compliance with the laws until about the first of July, 1867. The first forty miles of road commencing at Cedar Rapids and extending west were built during the summer and fall of 1861, to a point on Otter Creek. About December 1, 1862, the road was completed to Marshalltown, Iowa. About July 1, 1864, the road was built to Nevada. Some time during March, 1865, the road was constructed to Boone Station, and during the winter and spring of 1867, the road was opened to business, and about July 1, 1867, the road was finally completed to its western terminus on the Missouri River, opposite Omaha, a distance from Cedar Rapids of 271 6-10 miles.

I claimed for the road all the vacant lands within the 15-mile limits of the grant of 1856, and also all the vacant lands within the limits of the modified line under the act of June 2, 1864. Soon after the passage of the act of June 2, 1864, as the agent of the railroads, I made a formal application to the Land Department at Washington, for the certification to the railroads of all the vacant lands inuring to the road under the acts of Congress, and from time to time I personally urged the Commissioner of the General Land Office, to adjust the grant and certify the lands. I also employed Wm. T. Steiger, of Washington, D. C., as an agent of the company to urge upon the Department the adjustment of the grant.

I caused a map of the line of the general route of the modified line extending from Cedar Rapids to a point at or near Missouri Valley (so-called,) to be filed in the Department of the Interior in 1865. This map was necessarily at some points preliminary in its nature. On the 19th day of December, 1867, I filed a map of the line of the remainder of the modified line, and showing the western terminus of the modified line, as originally contemplated. I asked the Department to attach this map to the map filed July 11, 1865, and have it made a part of the same showing one continuous line from Cedar Rapids to its western terminus opposite Omaha. I also offered to file a map of the modified line showing the continuous line from Cedar Rapids to the western terminus of the road on the Missouri River, opposite Omaha, in lieu of the maps already filed, but the Commissioner informed me that this would not be necessary and that the maps filed would be treated as a map of the continuous line of the modified line of road.

I have no personal knowledge whatever of any improvements made or houses built upon the lands in dispute.

CROSS-EXAMINATION.

The maps referred to, adopted June 19, 1865, was a map of the line of the general route of the C. R. & M. R. R. R., so far as the same was then located, and was necessary preliminary in its nature at some points, but it was not intended to be and was not a full and complete map of the entire line of the modified line of plaintiff's road, as the same was at the time and originally contemplated, and subsequently constructed. The remainder of the modified line of the road from Missouri Valley (so-called,) to a point on the Missouri River, opposite Omaha, was located subsequently to the date of the filing

of the map referred to, though this part of the line was originally contemplated and intended to be constructed and a map of the last part of the modified line was filed by me in the Department at Washington, December 19, 1867.

The point on the Missouri River, indicated on the map, filed July 11, 1865, is not the terminus of the modified line of the Cedar Rapids and Missouri River Railroad, nor was that point ever intended to be the western terminus of the modified line. There is no such terminus referred to in the interrogatory.

The Sioux City and Pacific Railroad is not the Iowa branch of the Union Pacific Railroad. The Sioux City and Pacific connects with the Union Pacific at Fremont, Nebraska.

Cross Int. 3.—What were the termini of the Iowa branch of the Union Pacific, as originally located? Give the date of such location, and state whether any changes have been made in the same, and if so, what changes and where made? How far from Missouri Valley, and in what direction is the nearest point at which it strikes the Missouri River, as originally located, and at each subsequent change of location?

Ans.—I had nothing to do with the location of that road, but I think the eastern terminus of that road was located on east bank of the Missouri River nearly opposite Omaha.

Cross Int. 4.—What line of Railroad to the Missouri River past Missouri Valley, and opposite or nearly opposite thereto, did you or plaintiff build other than the so-called Onawa branch connecting Missouri Valley and California Junction to the river? Did you or plaintiff ever build any railroad to the Missouri River from Missouri Valley, running parallel or nearly parallel to the

so-called Onowa branch, striking said river at point two or three miles south of the line of the Sioux City and Pacific, running west from California Junction or at about that distance?

Ans.—No other road than the main line of the C. R. & M. R. R. R. from Missouri Valley to a point on the Missouri River, opposite to Omaha, was built other than the one named.

Cross Int. 5.—Did you or plaintiff ever build any railroad west from Missouri Valley on the route adopted June 19, 1865, and shown by the map filed July, 1865, before mentioned. If so, when, and to what point? Give the length and direction of the line, and state to what point on the Missouri River it was built? If you attatch any map to your deposition, designate such line thereon?

Ans.—The line shown on the map filed July 11, 1865, from Missouri Valley (so-called), to the Missouri River, as indicated on said map, is no part of the modified line of the Cedar Rapids and Missouri River Railroad, and was never intended to be any part of it, and the plaintiff never built any road on it.

The Cedar Rapids and Missouri River Railroad formed its connection with the Iowa branch of the Union Pacific at a point on the east bank of the Missouri River opposite Omaha.

Cross Int. 7.—What, if any, arrangement did you or plaintiff, or you and others with you, make with the Union Pacific Co., or any corporation or person or persons other than the United States for building the railroad from Missouri Valley past Council Bluffs to the bank of the Missouri River, opposite Omaha, or any part of such road, and when was such arrangements, if any, made? What were you or plaintiff, or you and

any others with you, to receive for building such railroad, or any part thereof, from the Union Pacific company, or any other corporation or person or persons other than the United States, and how much received? State fully?

Ans.—The C. R. & M. R. R. R. Co. received nothing. The bonuses or considerations named, other than those from the United States, were all given to the Iowa Railroad Constructing Company, a company which constructed the line of plaintiff's road from Des Moines River to the western terminus of it on the Missouri River, opposite Omaha, as contractors. These bonuses were mainly given for the sacrifices made by the Railroad Constructing Company in pushing through the work to a connection with the Union Pacific Railroad in the short time in which the work was accomplished. Bonuses on this account were received by the Railway Constructing Company from the Union Pacific Company, Chicago and Northwestern Company, the people of Omaha and Council Bluffs. Some of the bonuses were in bonds—some in other forms of obligations, and from the fact that many of the obligations thus given were repudiated by the donors, I am unable to give the amount fully realized by the Iowa Railroad Constructing Company from their bonuses.

I caused the map to be filed that was filed July 11, 1865, which map was preliminary in its nature at some points, and also filed a map of the remainder of the modified line of road with the Department at Washington, December 19, 1867, which latter map showed the western terminus of the modified line of plaintiff's road.

Cross Int. 9. State whether you had knowledge of the passage of the act of Congress of July 1, 1864, re-

lating to the selection of Railroad land, and of the instructions of the Land Department issued in pursuance thereof by the Commissioner, May 30, 1866, and approved by the Secretary of the Interior June 6, 1866, requiring the companies to select the land claimed by them under their respective grants? State whether the plaintiff, in compliance with said act and instructions, appointed agents to select the land claimed by it under the grant of 1864, and the source of your information.

If you say you took any measure to secure the certification of the land in controversy, or any other of a like nature now pending in Monona county? State what, if any, measures in the direction required by said act and instructions were taken by you or plaintiff, and give the source of your information upon the subject, and give the date of the selection?

Ans.—I had no personal knowledge of the passage o the act referred to, nor of the instructions of the Land Department referred to. I have no knowledge tha plaintiff appointed agents in compliance with the law referred to, and I don't understand that the requirements of the law are such as are assumed in the interrogatory.

The object sought in appointing agents was to identify the lands with a view to future certifications, and assist the Department in adjusting the grant. The measures taken by me to secure the land grant to plaintiff were general in their nature, the details being left to others; I cannot say that I took any special measure to secure the lands in Monona county more than in other counties.

Cross Int. 10.—If you say any of the lands referred to in the last interrogatory were included in the lists of selections made by plaintiff prior to 1874, give the source

of your information—the date and number of the list, and attach a copy of the same to your answer; mark it exhibit "A."

Ans.—I cannot say that the lands in controversy were embraced in lists of selections made prior to 1874. I have no personal knowledge of the selections referred to.

My efforts to secure the adjustment of the grants and certification of the lands to plaintiff were general in their nature, the details being left to others. I presume that whatever was necessary to be done to secure the grant was being done. I did not consider that the acts of Congress imposed upon plaintiff the duty of selecting the lands, though for the purpose of aiding the Department lists were made up by agents appointed by plaintiff for the purpose of identifying the lands, and I can explain what appears to be a cessation of efforts on plaintiff's part only on the theory that I and plaintiff con-idered it the duty of the Department to certify the lands and presumed it was being done.

I neither have nor had any knowledge of any improvements on the land in controversy. I presumed the Department would adjust the grant to the railroads, as the law required and set off all the vacant lands inside the granted limits to plaintiff I did not suppose the government would dispose of lands other than as the law directed. I am not aware that plaintiff was waiting during five years. I have heard that the homestead a t was passed by Congress, but don't know its provisions.

I appointed an agent at Washington to look after the adjustment of the grant to plaintiff, and I had numerous interviews with the officers of the Land Department, and urged the certification of the granted

lands. I don't understand that the Department refused to certify the lands. I presume the failure to adjust the grant was owing to the press of business at the Department and the change of officers.

Cros Int. 14.—If you say you claimed under the act of June, 1864, any lands except for roads actually built from Cedar Rapids west, you will please state whether you entered into a contract with Platt Smith, attorney, a copy of which is hereto attached (here Commissioner will please hand witness accompanying copy of contract) and mark said copy exhibit "C," and make it a part of your deposition? State whether the lands then claimed by plaintiff, including the Des Moines River land, which it did not abandon until the decision of United States Supreme Court of the Plaintiff vs. The Des Moines Company and Williams vs. Baker in 1872, were not amply sufficient, excluding the lands in controversy, to give plaintiff six sections per mile from Anamosa to the Missouri River? What kind of earnest effort was it in which it was understood that both parties should unite to draw lands on the Anamosa line. Was plaintiff in need of help to select the lands or an act of Congress? Did you suppose at that time that there were 46,000 acres of public land along the line from Anamosa to Cedar Rapids? What was meant by the stipulation that it was the intent to draw lands for the road from Anamosa to the Missouri River, if, under existing grants, you supposed plaintiff entitled to draw lands from the Mississippi River to the Missouri River?

State further what was meant by the condition that the parties should be able to hold for and on account of the construction of the road from Anamosa to Cedar Rapids at least as much land as forty-six thousand acres?

Ans. I did enter into an agreement with Platt Smith, attorney, and cannot state whether the copy presented is a true copy or not, not having the original. As I understand the matter, if the Des Moines River lands had been included it might be sufficient to give plaintiff six sections to the mile from Anamosa west. As to the conditions in the agreement inquired about I neither had then nor now any particular interest in them, except in the last clause of said agreement, the balance of the agreement having been drawn up by Platt Smith. This deponent added all after the word "provided," and so long as the Cedar Rapids and Missouri River Railroad was not bound to convey lands for the road from Anamosa to Cedar Rapids unless it obtained 46,000 acres for that portion of the road, the other conditions of the contract concerned me very little.

(Tr. pp. 536–564).

Exhibit "C," attached to commission and referred to in 14th cross-interrogatory to Blair, is as follows:

"*Resolved*, That the contract (so-callad), contained in letters and papers between the president of this company and Hon. Platt Smith, attorney, for certain owners of a judgment against the late Iowa Central Company, and as claimed by said Smith, concerning the land granted to the company, is a fair and just basis of compromise of said claim and judgment, and the president is authorized to settle the same in conformity with the spirit of the contract referred to, with the right also to adjust, in his discretion, any difference of opinion that may be between the parties relating to the right of way or franchise between Anamosa and Lyons, it being understood that both parties shall unite in all earnest effort to draw the lands on the Anamosa line by which this contract can be satisfied. The matter is to be settled as

follows: The 46,000 acres of land shall be taken from the land grant remaining undisposed of and to which the title is undisputed, beginning at the township line north of Mapleton in Monona county, on the northerly side of the surveyed line of the Iowa Central Railroad, taking odd and even numbered sections to which either of the acts of Congress has given title, and running thence east only on the northerly side of said line, for quantity, taking all lands of the grant to which the title is undisputed.

"The decree is to be assigned to John I. Blair. The question of old grade to be left to future consideration. The parties agree to join in doing all acts which may be necessary to complete the title, which shall be transferred to Platt Smith as attorney, or to such other parties as may be mutually satisfactory, it being understood that the intent is to draw lands for the road from Anamosa to the Missouri River. This shall be a full and final settlement of all claims and demands between the parties. *Provided*, this settlement is on this condition; that the parties shall be able to hold for and on account of the construction of the roads from Anamosa to Cedar Rapids at least as much land as 46,000 acres.

"The C. R. & M. R. R. R. Co.

"By John I. Blair,

"Platt Smith,

"*Attorneys.*

"Cedar Rapids, June 28, 1867." (Tr. pp. 563-4.)

By Stipulation of parties the statement of case and opinion in cases of Williams vs. Baker, and The C. R. & M. R. R. R. Co. vs. Des Moines Navigation and Improvement Company, found in 17 Wallace, p. 144, shall be competent evidence of the matters therein stated (see tr. 141.) and said cases hold that neither the State of

Iowa, nor the railroad company for whose benefit the grant of 1856 was made, took any title by that act to the lands then claimed to belong to the Des Moines grant of 1846, within the five-mile limit on each side of the Des Moines River, and that by the joint resolution of 1861 and the act of 1862, the State of Iowa did receive the title for the use of those to whom she had sold them as part of that grant. (Tr. pp. 566-583.)

Plaintiff next offers in evidence, section 10, act 2, Congress approved March 3, 1865:

SEC. 10. *And be it further enacted*, That the time mentioned in an act, entitled "An Act making a grant of lands to the state of Iowa in alternate sections to aid in the construction of certain railroads in said State," for the completion of the railroads named in said act be and the same is hereby extended for two years.

(Tr. p. 584.)

By stipulation of parties (see tr. p. 141,) the Burdette letter hereinbefore set out (abstract pp. 64-79) is made competent evidence of the matters therein stated, and may be introduced by either party.

By stipulation of the parties (see tr. 140-141,) any map introduced by either party, certified by Commissioner of General Land Office, shall be competent evidence of the matters embraced in said certificates.

Plaintiff next offers in evidence deposition of Wm. Ragan, taken in said cause, which is as follows:

My name is Wm. Ragan; 44 years old; reside in Clinton, Iowa, and by occupation an attorney.

I was in the employ of the Iowa R. R. Land Company from November, 1873 to November, 1878, and during that period also acted as agent of the Cedar Rapids and Missouri River Railroad, a corporation selecting lands for the latter corporation from the latter part of

1875 until about the 1st of November, 1878, and acting as general agent for the Iowa Railroad Land Company, performing various services pertaining to the land grant of the Cedar Rapids and Missouri River Railroad.

During the latter part of the year 1874, and continuing through the early part of 1875, I commenced examining the records of the United States Land Office, at Sioux City, Iowa, and examined the tract books and the plats and all the records of that office which were necessary to enable me to determine the specific lands which the Cedar Rapids and Missouri R. R. Co. claimed under the acts of May 15, 1856 and June 2, 1864. I also, during 1875, examined the tract books, plats and the necessary records, in the United States Land Office, in Des Moines; that included what is known as the Council Bluffs and Fort Dodge districts. I also, during the examination, took up what was referred to as "Clarke's suspended lists," which embrace the old Des Moines district the district of lands subject to sale in Iowa, known as the Ft. Des Moines district. The territory examined by me was the entire territory in which the grant was situated, except the old Des Moines district. After having made the examination I selected, as the agent of Cedar Rapids and Missouri River Railroad all the vacant lands which I found would inure to the grant in the Sioux City district, and also the vacant lands found in what was known as the Council Bluffs district, and also the vacant lands found in what was known as the Fort Dodge district, and the vacant lands which were found in what were referred to as "Clarke's suspended lists," in the old Des Moines district. The Council Bluffs district at the time being consolidated with the Des Moines district was known as the "Des Moines consolidated district."

The vacant lands selected by me in the Sioux City district in April 1876 and October, 1876, amounted to 1,455 99-100 acres.

The vacant lands selected by me in the consolidated Des Moines district during the months of March and November, 1876, amounted to 8,196 37-100 acres. That embraced all the vacant lands that I found in the districts named subject to selection up to and embracing November, 1876.

I also selected in the Des Moines consolidated district, embracing the territory known as the Council Bluffs district and Fort Dodge district all the lands that I found from an examination of the books and records of the office which the Railroad claimed and which by the records of the office were shown to be covered by various claims adverse to the claim of the Railroad Company, such as homestead, pre-emption, swamp, and every class of claims amounting in the aggregate to 24,974 40-100 acres.

I also selected in the Sioux City district all the lands I found there to which the Railroad Company had claim and which were covered by adverse claims such as homestead, pre-emptions and swamp claims amounting to 13,492 51-100 acres.

These several lists, covered by adverse claims were presented to the Register and Receiver of the office at Des Moines and Sioux City for their approval; and the Register and Receiver of each office refused to approve the lists, and so certified.

All the vacant lands selected by me under dates heretofore named, amounting to 9,652 30-100 acres have been approved by the Secretary of the Interior for the benefit of the grant under acts of May 15th, 1856 and June 2, 1864, except 200 acres. Between July, 1877 and

the latter part of August, 1878, I selected in the Sioux City district and Des Moines consolidated district, 2,299 82-100 acres, which selections were certified by the Registers and Receivers of the offices mentioned, and which had not been approved to the grant by the Secretary of the Interior, up to the 1st of November, 1878, the date at which I left the service of the company; and by examination of a record now in my possession these selections were still pending before the Interior Department, May 13, 1880. The lists which I have in my possession are referred to or known as lists Nos. 4, 5, 6 and 7. As the result of my examination of the various records referred to, I claimed and selected all the lands found by me, which were vacant and to which, in my judgment, the Railroad Company had claim.

I embraced in my selections all the vacant lands found from on examination of the books, and all other lands which in my judgment after an examination of the laws and rulings of the Department, would pass under the grants of May 15, 1856 and June 2, 1864, though the same were covered by adverse claims, such as homestead, preemption and swamp, and it was my purpose and aim to embrace all the lands not disposed of by the Government and to which the company had valid claim, whether previously selected or not, and which had not been approved by the Secretary of the Interior.

Up to and including November, 1875, Wm. T. Steiger made selections for the company in Washington City; after that period and while in the service of the company I made all the selections that were made for the company.

I am satisfied that the lists heretofore referred to numbered 4, 5, 6 and 7 and aggregating 2299 82-100 acres,

are the only lists now before the Land Department awaiting adjustment.

CROSS-EXAMINATION.

Int.—Did not Mr. Steiger on Dec. 13, 1875, forward to Iowa a list of lands which was filed in the Des Moines District including the old Council Bluffs District amounting to 26,091 73-100 acres, March 16, 1876.

Ans.—I have no knowledge of Mr. Steiger forwarding such a list to the United States Office. He has been making selections of land for the company up to the year 1876. He forwarded a memorandom list of lands to the company's office, at Cedar Rapids. The list that Steiger forwarded to the company's office embraced the same lands as near as my memory serves, that I afterwards selected in March, 1876. In 1875 there was forwarded to Steiger at Washington, a pencil memorandom list of lands, which I had taken up as the result of my examinations of what was known as the Council Bluffs and Fort Dodge Land Offices, so that he might compare the same lists with the books at Washington. After his examination of the lists in Washington the pencil memorandom list was returned to the company's office at Cedar Rapids, and soon after Mr. Steiger forwarded to the company's office, at Cedar Rapids the memorandom list to which I have referred, and which in the main is embraced in the list of lands selected by me in March, 1876.

I do not make up my list from the list furnished by Steiger, for Steiger's list, which came to me, was based upon the examination made by me and sent to him at Washington for comparison with the books there.

All the lands selected by me in the Des Moines District including the old Council Bluffs District were not north of the 20-mile limit. I have no means of answer-

ing the question, whether all of the rejected sect
were north of the 20-mile limit. I could not an
without a diagram whether all the lands listed by
as being within the 20-mile limit of the modified
in the old Council Bluffs District and Sioux City Dis
were within the 15-mile limits of the original line.

I selected all the lands to which upon examina
of the records of the United States Land Offices at S
City and Des Moines, I found subject to the grant under
the acts of May 15, 1856 and June 2, 1864, and to which
in my judgment the company was entitled. I cannot
identify the particular lands referred to as embraced in
the lists may by Steiger. My selections speak for them-
selves. The lists show the exact limits within which
said tract was located.

I have no control over the lists of selections made by
me for the Cedar Rapids and Missouri River Rrairoad
Company, and therefore cannot furnish copies asked
for.

Ques. You have the copy of the selections made in
March, 1876, which were rejected, in your lap at this
moment, haven't you?

Ans.—The selections were made in March and April,
1876, and I have them in my lap, but they are not my
property.

(Here counsel for defendant insists that a copy such
as called for will show that the statement of the witness
that he made selections of lands previously selected and
rejected is incorrect and insists on his right to have a
copy attached as proper cross-examination, and for fail-
ure of the witness to attach the same, objects to all his
examination in chief as incompetent for the reason the
witness refuses to submit to a cross-examination.

Plaintiff's counsel hereby offers to permit defend-

ant's counsel to copy or cause to be copied the list referred to, to be attached to the cross-examination and will place them at his disposal at any convenient time and place for that purpose.) So far as relates to the lists in question I based my testimony as to amounts and dates of my selections upon the lists referred to, I refer to those lists as the results of my examination of the books of the United States Land Office. These lists contain the result or results of the examinations made by me in the United States Land Office at Des Moines and Sioux City, and embrace all the lands that I found, which upon the examination of the laws and rulings of the Department, in my judgment passed to the grant under the acts of May 15, 1856 and June 2, 1864, and which were covered by an adverse claim, such as homestead, pre-emption and swamp. The land selected in these lists are the results of examinations made at the local land office as heretofore testified. My testimony in chief is not based upon lists but based upon records, the lists being the result of examinations. I gave my testimony from memory as to the general scope of my work in the examination of records; the matters of fact spoken of as to dates of selections and the aggregations of the lands were taken from the lists.

(Defendants Counsel: It having now been disclosed that the testimony of the witness is based upon the lists as memorandum, so far as dates and amounts are concerned defendant again objects to all testimony in chief of the witness unless the memorandum is put in.

Plaintiff's counsel hereby again offers to submit the list to defendant's counsel for the purpose of having the same copied some copies. Defendant declines putting in the list as a part of his own testimony and insists that it go in as a part of the testimony of the witness and of plain-

tiff or that the testimony of the witness be exclude'.(

Q.—Of the selections of Street, south of 20-mile limit in 1866, amounting to 139,565 acres, 3,149 acres were rejected. You did not select any part of those rejected lands, did you? (Objected to by plaintiff). 1. As not proper cross-examination. 2. The question assumes facts which have not been proven or testified to.

Ans.—I cannot specifically refer to what is designated as Street's selections. I examined the proper records of the United States Land Office at Sioux City and Des Moines, and selected for the company all the lands which, in my judgment, after an examination of the granting acts and the rules and decisions of the department relating to the same, the company had claim and which were vacant or covered by adverse claims. The rejected lists which were made in triplicate, were disposed of in the following manner: Two copies were retained by the Register of the Land Office, in which selections were made, and one copy given to the selecting agent after having been duly signed by the Register and Receiver.

My examination of the tract books enabled me to take therefrom a history of each individual tract of land embraced in the rejected selections. In other words, the notations opposite each tract of land in the list of rejected selections, is certified to by the Register and Receiver as showing the manner in which the lands were disposed of prior to the date of the certificate. I am unable to state as to whether the tract books now show that the list of selections are posted thereon. I did not find that the prior rejected selections were posted thereon. I did not find them posted on the books. It is not the custom of the office to post the rejected selections upon the books, but to file a list in the

office, the history of the tract being taken from the tract book. I did not find any of the selections rejected prior to my examinations entered upon the tract books. My best recollection is that I compared what is referred to as the Clarke list with the tract books. I am unable to say, positively, whether I found the lists entered. I found no official rejected lists on file in the office. I am not sure that the Clarke list is official. It is a fact, as to a certain amount, that of the selections rejected a portion were contained in lists a portion of which were approved—the rejected selections being simply stricken out—I cannot give the amount. I know that some of the lands selected by me in 1876 had been previously selected by Steiger, but I am unable to give the dates or the amounts, for the reason, as I now remember, I was only furnished with a memorandum list by Steiger. I can only refer to one list that I know of positively that Steiger selected, and the tracts rejected stricken out. That list was dated Oct. 17, 1874, Washington City. It was filed in local office at Sioux City, November 16, 1874, and contained 2,459 6-100 acres. 1,600 hundred acres were stricken out. 859 06-100 acres were approved. The 1,600 acres stricken out were made up of swamp selections and homestead entries allowed after June 2, 1864. The lands covered by the homestead entries I subsequently selected. That is my recollection. The swamp claims to the lands covered by swamp selections was contested and the lands found not to be swamp, and were subsequently selected by me. These are not all of the rejected selections that I selected.

In the Des Moines district of the selections of Clarke, my best recollection is that there was between 1,700 and 2,000 acres that were not clear. I selected those again

that were not otherwise disposed of prior t
January, 1876. By "otherwise disposed of" I
lected or clear lands or lands to which the com
no claim.

Ques.—Do you mean that there was any
lands selected by Clarke covered by claims having their origin prior to the date of the act under which he selected them.

Ans.—I have not the memorandum before me, and cannot answer. I cannot state I took all the lands in the list, to which, in my judgment the Railroad Company had a valid claim.

(Defendants object to all the testimony of the witness as to his judgment as to what lands the company had a valid claim as incompetent and so much of the answer as relates to the land he took as not responsive).

I have no knowledge of the selections of 1866. I selected, as I said, all the lands that I found in all the districts to which the company had claim at the time of my examination.

Ques.—Do you mean to say you selected the 40,000 acres of rejected selections in the Fort Dodge and Des districts—the 4,000 acres rejected in the Council Bluffs and Sioux City districts in 1866, and the 10,000 rejected in the old Council Bluffs district in 1872, and embraced in Steiger's list of March 18, 1872. (Plaintiff objects to question as improper cross-examination—no question having been asked the witness as to the rejected selections, and there is no proof as to such selections having been made or rejected.)

Ans.—If such selections were ever made I never saw an official copy of the list of selections, and have no knowledge of them. In these selections made by me in 1876, and rejected as testified by me amounting

to 37,000 or 38,000 acres, about 1,695 acres purport to be within the 20 mile limits.

Of the 37,000 or 38,000 acres about 36,000 acres are involved in this, the so-called homestead suits, pending in Woodbury, Monona, and other counties. Out of the 37,000 or 38,000 acres selected by me and rejected, 1,280 50-100 acres are located on odd sections.

These tracts are all within the 6 and 15-mile limits of the original line.

The adverse claims to these odd sections all originated since June 2, 1864, as shown by the lists except 40 acres.

There are 800 acres in odd sections included in the list which I have said are still pending in the Department for final action.

These lists number 4, 5, 6 and 7, aggregating 2,799 82-100 acres still pending before the Department have been certified by the local office as vacant. I know of no legal adverse claim to them, and know nothing about rejected selections in Fort Dodge District except the selections I made. In the old Des Moines District my examination in the main was confined to the land embraced in what was called "Clarke's suspended list." I did not examine the territory known as the Des Moines District, other than what was in the list with possibly a few exceptions, this might come to my knowledge by opening the tract books. I made no regular examination consecutively or thoroughly, I could not give you the date of the Clarke list, but I think the selections were made in 1867. I cannot give the exact date when I last saw the Clarke list, I saw it in the last six months, but did not examine it for dates or any other purpose more than to see it, this is my remembrance.

There are two of these suspended lists, I think, they

embrace between 17,000 and 19,000 acres. I have no means of knowing the character of the claims with which the selections conflicted. When I was with the company I think it had a copy of the list but I don't know that it has now.

I have no personal knowledge that Steiger filed a list of 11,924 acres in 1872. I only know that I examined the official records of the United States Land Offices as the source of my information in making selections and embraced therein all the lands found vacant and all the land of whatever character I found within the limits of the grant, which in my judgment under the laws and rules and decisions of the Department, the company had had claim to. I cannot state positively what portion in acres of the "Clarke suspended lists" I embraced in my selections but think there was between 1,000 and 2,000 acres of vacant lands, and I can only identify a 40 acre tract of land covered by an adverse claim. It is my best recollection that the 40 acre tract was all that there was in the suspended lists covered by adverse claim which I selected. I cannot testify as to what tracts were abandoned. I can only testify to those that I took up while selecting. My selections were made in 1876. I took up what I found at that time subject to selection. I cannot use the term abandoned as applied to the selections. I only know that I selected all the lands I found, to which the company had claim. I don't know how many lands were certified in 1876 and 1877.

Ques.—Did you select any lands, the selection of which was rejected, except those embaced in the lists aggregating 38,000 before mentioned?

Ans.—Not for the Cedar Rapids Company.

Ques.—Within which of the old districts are the lands embraced in the lists last mentioned purporting to be within the twenty-mile limits?

Ans.—I cannot testify positively as to that, but think in what was known as the old Fort Dodge district.

Ques.—Were they not in that tract of country where the grants to the Cedar Rapids Co. and the Dubuque and Sioux City Company overlapped ?

Ans.—I could not state without a diagram, my impression is that some of them are in that district.

Ques. 69.— In regard to adverse claims to land embraced in lists of rejected selections made by you to how many acres of such land, did the conflicting claims appearing on such lists arise between June 2, 1864 and April 1, 1869—how many from April 1, 1869 to March 18, 1872, and how many from March 18, 1872 to time of selection?

Ans.—The question involves a large amount of labor and time to answer. I cannot answer specifically without examining each individual tract.

The list I have in my possession as taken from the tract book, in the United States Land Office and certified to by Register and Receiver, state when such claims arose and their character.

Ques.—I will ask you to read from the list beginning with the first entry, the description of law, the entry designating the limits within which it is included and the entry relating to adverse claims, and continuing to read each entry that the same may be taken down and made a part of your testimony. (Plaintiff objects as incompetent, immaterial and not proper cross-examination, the lists referred were not made the subject of examination in examination of witness in chief, but simply referred to by him to refresh his recollection as to date of lists and aggregate amount of lands mentioned therein, that such lists are duplicates, or copies of official lists on file in office of Register and Receiver, at Des Moines and

Washington, to which defendant can have access and from which he can get copies. That said lists contain about 45 pages, 12 inches wide and 18 inches long of closely written matter, mostly figures, describing over 36,000 acres of land mostly in 40 acre tracts and as to each tract more than one line of such page, and often 5 or 6 lines are required to describe it, and it is an imposition on Natury, and witness and the court to require records of public offices to be transcribed and treated as evidence in this manner.

Defendant protests against the refusal of witness to give the information called for by last cross-interrogatory but two (No. 69) which might be done in half an hour, and thus obviate the necessity of reading the entire record and protests that such refusal is an imposition on defendant and court. That question relates to character of selections testified to by witness and to memorandum on which he bases his testimony as to the amount and date of selections and is material to the case.)

Ans.—Witness states, that to make an intelligent answer to cross-interrogatory 69 would require him to spend at least a day in examination of the lists and that he is willing to make an examination and give the answer desired if time is granted, and time is therefore granted him for that purpose.

EXAMINATION RESUMED.

Ans.—I have made the examination, and find, as shown by the notes opposite the tracts embraced in the lists that claims to about 1,527 were initiated prior to June 2, 1864, and claims to abont 21,000 acres were initiated between June 2, 1864 and April 1, 1869; and claims to about 10,700 acres were initiated between April 1, 1869 and March 18, 1872; and claims to about 5,200 acres

were initiated between March 1872 to the date of selection, 1876.

The aggregate of these several amounts differs in about 200 to 250 acres from the aggregate as footed in the lists, resulting, I presume, from error in the hasty examination of the lists.

(The plaintiff objects to the answer, and moves to exclude the same for the reasons, 1st. That it is improper cross-examination. 2d. That it purports to state the contents of written instruments or official papers filed in public offices. 3d. That the lists themselves, or duly certified copies thereof are the best evidence. 4th. That the answer contains the result of the examination made by the witness of said lists which results would be better ascertained by inspection of the same by the court.)

There are some of the locations as shown by the lists to be made with swamp indemnity script, (plaintiff objects to this as lost above.)

I found some tracts of land, the selections of which had been allowed by local office, and afterwards rejected by the Department. And after having the tracts cleared from conflict, selected them; it frequently appears that the records of local office differ from the records of the General Land Office and it becomes necessary in order to remove apparent conflict to thoroughly examine records of both offices.

I have no means of knowing how many there are of that character. I apply the name of "Clarke's suspended list" myself for the reason that my memorandum is that these lists were not approved by Register and Receiver, and to distinguish these lists from a list made by Clarke which was approved. I have no means of knowledge as to the suspended list being disapproved by the local office or not acted upon, but only give it as my opinion

that the lists were rejected by local offices. This Clarke was Felix G. Clarke, at present Register of local land office at Des Moines. (Tr. pp. 1053-1092.)

Plaintiff offers in evidence certified copy of lists Nos. 4, 5, 6 and 7, of lands claimed as inuring to the grant not yet disposed of with the several certificates thereto attached, date of certificate of General Land Office thereto attached being May 30, 1880, and introduced and marked as exhibit "A," No. "1," and is as follows:

No. 4.

North of base line and west of 5th P. M.

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD LIST.

No.	Parts of Section.	Sec.	Tp.	R.	A.	limits
1	E½ N-W¼ and S-W¼ N-E¼	22	88	37	120	15
2	S-E¼ N-W¼ and S-W N-E¼	13	86	42	80	6
3	W½ N-E¼	26	86	42	80	6
4	S-E¼ N-W¼ and S-W¼ N-E¼	33	86	42	80	6
5	W½ S-W¼ and S-E¼ S-W¼	22	87	43	120	15
6	S-W¼ S-E¼	22	87	43	40	15
	Total acres.				520	

Attached to above list is the following affidavit and certificate.

UNITED STATES LAND OFFICE,
SIOUX CITY, IOWA.

I Wm. Ragan, being duly sworn depose and say that I am land agent of the C. R. & M. R. R. R. formerly the Iowa Central Air Line Company; thus the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by said C. R. & M. R. R. R. as inuring to it to aid in the construction of said railroad from the Mississippi to the Missouri River, for which a grant of lands was made by acts of Congress, approved

May 15, 1856 and June 2, 1864; that the said lands are vacant, unappropriated and are not interdicted mineral or reserved lands: and are of the character contemplated by the grants being within the six and fifteen-mile limits on each side of the line of route of the original main line.

WM. RAGAN,
Land Agt. C. R. & Mo. R. R. R.

Sworn to and subscribed in my presence by Wm. Ragan, on this 27th day of July, 1877.

GEO. H. WRIGHT,
Register
U. S. Land Office,
Sioux City, Iowa,
July 27, 1877.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the C. R. & Mo. R. R. R. Co., under the grants to said railroad by act of Congress approved May 15, 1856, and June 2, 1864, and selected by Wm. Ragan, the duly authorized agent, and we have tested the acurncy of said lists by the plats and records of this office and that we find the same correct, and we further certify that the filing of said list is allowed and approved and that the whole of said lands are surveyed public lands of the United States, and within the 6 and 15-mile limits on each side of the line of route of original main line and the same are not, nor is any part thereof returned and denominated as mineral land or lands, nor claimed as swamp land, nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or recorded in this office. We further certify, the foregoing list shows an assessment of fees payable to us, allowed by the act of Congress of July 1, 1864,

and contemplated by the circular of instructions, dated Oct. 15, 1873, addressed by the Commissioner of General Land Office, to Register and Receiver of the United States Land Office. We further certify that the list of selections aggregates 520 acres, and that the said company has paid to the undersigned, the Receiver, the full sum of $6.00 in full payment and discharge of fees.

GEO. H. WRIGHT,
Register.
WM. R. SMITH,
Receiver.

No. 5.

North of base line and west of 5th P. M.

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD LIST.

Sioux City District.

No.	Parts of Sec.	Sec.	Tp.	R.	A.	Remarks
1	W½ of S-W¼	26	87	40	80	6 Miles Limit.
2	N½ of N-E¼	24	87	41	80	6 " "
3	E½ of S-W¼	34	87	41	80	6 " "
	Total selected,				240	acres.

Attached to this list No. 5, is an affidavit of Wm. Ragan, dated August 14, 1877, the same as attachedto list No. 4, aforesaid, and a certificate of the Register and Receiver of the United States Land Office, at Sioux City the same as attached to list No. 4, aforesaid, except the amount of fees, which is $3.00 on the last named list.

No. 6.

North of base line and west of 5th P. M.

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD LIST.

Des Moines District, Iowa:

Parts of section	Sec.	Tp.	R.	A.	Lim'ts
w ½ s-e ¼	25	85	3 e	80	15
n-e n-w "	2	86	18 w	39 36	15
n-w ¼ s-e "	2	86	18	40	15
s-e ¼ s-w "	15	86	29	"	15
s-e ¼ n-w "	29	86	29	"	15
s-e ¼ s-w "	29	86	29	"	15
n-e ¼ s-e "	33	85	30	"	15
s-e ¼ s-e "	9	86	30	"	15
s-w ¼ n-w "	25	86	30	"	15
s-e ¼ n-e "	29	86	30	"	15
w ½ n-w "	24	85	31	"	6
n-e ¼ n-w "	24	85	31	"	6
n-w ¼ s-e "	31	83	32	"	15
s-e ¼ s-e "	31	83	32	"	15
e ½ s-e "	32	83	32	80	15
w ½ s-w "	18	87	33	63 22	15
w ½ n-e "	2	85	42	77 24	6
s ½ s-w "	10	85	42	80	6
e ½ n-e "	20	84	44	80	6
e ½ s-w "	14	85	44	80	6
s-w ¼ n-w "	5	83	46	40	6
Total acres selected,				1,139 82	

Attached to said list 6 is the following affidavit and certificate:

U. S. Land Office,
Des Moines District,
December 21, 1877.

I, Wm. Ragan, being duly sworn, say that I am the land agent of the C. R. & Mo. R. R. R., formerly the

Iowa Central Air Line Co., that the foregoing list which I hereby select, is a correct list of a portion of the public lands claimed by said C. R. & Mo. R. R. R. as inuring to it, to aid in the construction of said R. R. from the Mississippi to the Missouri River, for which a grant of lands was made by the act of Congress approved May 15, 1856 and June 2, 1864; that the said lands are vacant, unappropriated, and not interdicted mineral, nor reserved lands, and are of the character, contemplated by the grants being within the six, fifteen and twenty-mile limits on each side of the lines of routes of the road.

WM. RAGAN,

Land Agt. C. R. & Mo. R. R. R.

Subscribed and sworn to before me this 21st day of December, 1877.

F. G. CLARKE,

Register,

U. S. Land Office,

Sioux City, Iowa,

December 21, 1877.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the C. R. & M. R. R. R. under the grants to said railroad by acts of Congress, approved May 15, 1856 and June 2, 1864, and selected by Wm. Ragan, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same correct. And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the 6 and 15-mile limits on each side of the line of road, and that the same are not now, nor is any part thereof returned and denominated as mineral land

or lands, nor claimed as swamp lands, nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or recorded in this office.

The certificate then concludes with the statement as to assessment of fees and payment of (same $14.00 to the land office as set out in certificate to list No. 4, aforesaid.)

(Signed) F. G. CLARKE,
Register.
H. H. GRIFFITHS,
Receiver.

No. 7.

North of base line, and west of 5th P. M.

THE CEDAR RAPIDS AND MISSOURI RIVER RAILROAD LIST.

Des Moines District, Iowa:

No.	Parts of Section.	Sec.	Tp.	R.	Acres.	Acts.	limits
1	s-e ¼ of n-w ¼	26	84	14	40	1864	6
2	s-e of n-e ¼	13	86	42	40	1856	6
3	s-w ¼ of n-e ¼	23	86	42	40	"	6
4	s-e ¼ of n-e ¼	23	86	42	40	"	6
5	n-w ¼ of s-e ¼	23	86	42	40	"	6
6	e ½ of n-w¼	24	86	42	40	1864	6
7	n-e ¼ of n-e ¼	14	85	43	40	"	6
8	s-w ¼ of n-w ¼	14	85	43	40	"	6
9	s-e ¼ of n-e ¼	2	77	45	40	"	20
	Total acres,				400		

Attached to this list is the affidavit of Wm. Ragan, of date of Aug. 17, 1878, of same form as affidavit attached to list No. 6, and certificate of Register and Receiver of the United States Land Office, at Des Moines, of same character and form as certificate attached to list No. 6 aforesaid.

Attached to said lists 4, 5, 6 and 7 aforesaid is the following certificate:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
May 13, 1880.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed abstract copies of lists numbered 4, 5, 6 and 7 of lands selected by the C. R. & Mo. R. R. R. Co. under the acts of Congress approved May 15, 1856 and June 2, 1864, and the certificates of the land agent of said company and also of the Register and Receiver of the Land Offices at Sioux City and Des Moines thereto attached, are true and literal exemplifications of that portion of the original lists now remaining on file and awaiting final adjustment by this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, &c., on the day above written.

SEAL.

J. A. WILLIAMSON,
Com. Gen'l Land Office.

(Tr. pp. 1093-1101.)

Plaintiff offers in evidence a stipulation signed by parties hereto, to be used in this case, and marked exhibit "A," No. 2.

"It is hereby stipulated by and between the Cedar Rapids and Missouri River Railroad and Iowa Railroad Land Company, and Anderson Jewell (plaintiff and defendant in this cause.) That on November 18, 1859, the Iowa Central Air Line Railroad Company selected from the land grant made to said company, under the land

grant of 1856, the first 120 sections of land inuring to said company under the said grant.

That of the 120 sections of land so selected, the said company had sold and conveyed to different persons all but 5,710 acres and that deeds for said land were filed for record in the counties of Woodbury and Monona, before the resumption of said land in March, 1860, by the state, with the exception of the lands conveyed after the resumption, and these deeds were filed for record soon after they were executed.

That the Cedar Rapids and Missouri River Railroad of said 120 sections conveyed to different parties as follows.

In 1868 240 acres.

In 1869 3,049 acres.

In 1871 40 acres.

In Sept. 1869, to the Iowa Railroad Land Company its co-plaintiff herein, all the lands of the grant including by specific description the said 120 sections.

That the Iowa Railroad Land Company of said 120 sections conveyed at different times to different persons, and that some of the grantees of said company are still in possession of portions of said land so conveyed.

The amount conveyed and time of conveyances are as follows:

In	1870	1410 acres.
"	1871	320 "
"	1872	160 "
"	1873	280 "
"	1874	9146 "
"	1875	3813 "
"	1876	200 "
"	1877	480 "
"	1878	200 "
"	1879	240 "
"	1880	360 "
"	1881	963 "

That the said 120 sections selected by the Iowa Central Air Line Company are a portion of the lands certified to the state of Iowa, as enuring to the land grants under the act of Congress of May 15, 1856, in December, 1858.

That the litigation in the case of Cedar Rapids and Missouri River Railroad vs. Milton Courtright, (one of the grantees of the Iowa Central Air Line Company,) in the United States Supreme Court, reported in 21st Wallace page 310, was in reference to the title to a portion of said 120 sections of land. That in case of Edgar T. Miller, (one of the grantees of Iowa Central Air Line Company,) vs. Iowa Railroad Land Company et al, commenced in Monona county, and appealed to Iowa Supreme Court and decided at June term thereof, 1881, the question therein was in reference to the title to a portion of said 120 sections of land. That the opinions of the court in said cases may be received as evidence of the holdings of the court in said causes and of the questions decided therein. That in a certain action brought in the Carrol County District Court of Iowa, wherein Carroll County was plaintiff, and Iowa Railroad Land Land Company was defendant and in which American Emigrant Company was intervenor, judgment was rendered December 1778, by said court in in favor of Emigrant Company, and against said defendant, establishing and quieting the title in said Emigrant Company to 6720 acres of land in Carroll county, the court holding that said lands were swamp and passed to the state of Iowa, under the Swamp Land Grant of Sept. 28, 1850, and that said Emigrant Company was the grantee of the state. That the same lands were certified to the state of Iowa as enuring to the grant, to said Iowa Central Air Line Railroad Company and Cedar Rapids and Mis-

souri River Railroad, under the acts of Congress of May 15, 1856 and June 2, 1864, and such certification was made prior to year 1875.

The foregoing stipulation is made subject to all objections which would exist as to the relevancy, competency and materiality of the facts agreed to, if record evidence were offered in support of same, and nothing herein contained shall be so construed as to make any of the decisions referred to competent evidence of any fact recited therein, except that actions were brought and decided as stated in the reports of such decisions, unless the record of such decisions and suits, would be competent evidence in this case in the absence of stipulation, and that said decisions shall in no case be of any greater force or effect than the record and decisions would be entitled to herein, in the absence of stipulation."

(Signed.) JOY & WRIGHT,
E. S. BAILEY,
Attorneys for Plaintiff.

(Tr. pp. 1102–1106). MONK & SELLECK,
Attorneys for Defendant.

The facts stipulated above relative to the disposition of 120 sections by the Iowa Central Air Line Railroad Company are objected to by defendant as immaterial and irrelevant and the facts stipulated in relation to litigations of plaintiffs, to which defendant was not a party are objected to by defendant as incompetent, irrelevant and immaterial and the record and decisions referred to therin are objected to for the same reason.

Plaintiff offers in evidence the opinion of the Supreme Court of Iowa in case of Miller et al. vs. I. R. R. Land Company et al. filed June 16, 1881 and reported in full in 56 Iowa Reports, plaintiff offers in evidence opinion of the United States Supreme Court in case C.

R. & Mo. R. R. R. Co., vs. Milton Courtright, reported in 21st Wallace, page 310.

DEFENDANTS TESTIMONY.

The defendant's attorneys offers in evidence all the testimony offered by them on a trial by these plaintiffs against Benjamin Herring, and embraced in the record of said cause here presented and filed in the Iowa Supreme Court, Aug. 9, 1879, to which plaintiffs interpose the same objection as appear in the record of said testimony introduced aforesaid.

Defendant offers in evidence certified copy of homestead entries, objected to by plaintiff as incompetent, irrelevant and immaterial. (See tr. exhibit 40, p. 586). This exhibit includes a number of homestead entries, but in this abstract is inserted only those in controversy, and is certified to by Register and Receiver at United States Land Office at Des Moines, Iowa, September 10, 1877, as being a complete copy of the book of original homestead entries, kept at Council Bluffs Land Office, so far as they are mentioned and narrated therein, and said evidence is as follows:

REGISTER OF HOMESTEADS.

Register of Entries made at the Land Office, at Council Bluffs under the Homestead Laws.

No of Application.	Date of Application.	Parts of Section	Number of Sections.	Number of Township	Range.	Acres.	Name of Applicant.	Remarks.
427	Feb 6, 1865	se sw	28	83	45	40	Anderson Jewell.	Entered Nov. 5, 1870.

Defendant offered in evidence tract-book of the United States Land Office, objected to by plaintiff as in-

competent and immaterial. (See tr. exhibit "41," pp. 583-608.)

The exhibit includes a number of tracts, but in this abstract is inserted only the land in controversy, and it is certified to by Register and Receiver at United States Land Office at Des Moines, Iowa, Sept. 10, 1877, as containing a full, true and complete copy of all the entries, notations, descriptions and memoranda on the tract-books of said office, which were formerly at Council Bluffs, Iowa, so far as they pertain to the parcels or tracts mentioned and described therein, and said evidence is as follows:

			Purchaser.	Date of Sale.	Number of Certificate.	To Whom Patented.	Date of Patent.	Where Recorded.	
	Acres.	Rate per Acre.						Vol.	Page.
5	40	$2.50.	Anderson Jewell.	Feb. 6, 1865.	227	Anderson Jewell.	July 7, 1871.	1.	14

ndant offered in evidence certified copy of final homesteads, objected to by plaintiff as incom- ad immeterial.

(See tr. exhibit "42," tr. pp. 609-19.)

The exhibit includes a number of tracts, but in this abstract is inserted only the land in controversy; this exhibit is certified by Register and Receiver of United States Land Office, Des Moines, Iowa, September 10, 1877 as containing a complete copy of original book of final proof, as kept at Council Bluffs, Iowa, then on file at Des Moines Land Office, as set forth therein, and said evidence is as follows:

REGISTER OF FINAL PROOF,

Made at the Land Office, at Council Bluffs, under the Homestead Act.

No. of Certificate	Date of Certificate.	Part of Section.	No. of Section.	No. of Township.	Range	Acres.	Name of Applicant	Residence	No. of Original Application	Commissions.	Price per acre
119	Nov 5 1870	se sw	28	83	45	40	Anderson Jewell	Monona Co. Iowa.	227	2 00	2 50

Defendant offers in evidence certified copy of railroad selections made by plaintiff in Monona County (objected to by plaintiff as incompetent and irrelevant.) This exhibit is certified to by Register and Receiver at Des Moines, Iowa, September 10, 1877, as containing a full, true and perfect copy of all selections of railroad lands in the sections, townships and ranges, as therein narrated and set forth (and is exhibit 43, attached to tr., pp. 620-634.)

This exhibit shows selections by C. R. & M R. R. R. Co. in Monona county, Iowa, through their agents, April 6, 1875, and certified to by Interior Department in supplement list No. 86, within 6-mile limits of 160 acres; September 2, 1872, certified by Department of Interior, in supplement list 78, within 20-mile limits, 400 acres; November 16, 1875, certified by Department of Interior, in supplement list 89, 680 acres; and shows selection by Wm. T. Steiger, agent for railroad company, October 7, 1875, of 400 acres; shows selections made by C. H. Street, agent for railroad company, and approved August 15, 1876, of 37,220 40-100 acres; and a large number of selections made by Wm. Ragan, agent for railroad company, March 16, 1876, but land in controversy is not included.

Defendant offers in evidence exhibit No. 44 [attached to transcript, pp. 635-8] being a certified copy of list of vacant lands in Monona county, transmitted with letter of November, 1867, and is certified to by Register and Receiver of United States Land Office. [Objected to by plaintiff as incompetent, immaterial and irrelevant.] Said exhibit is marked, List of vacant lands, November 11, 1867, at $2.50 per acre, Council Bluffs District, but land in controversy is not included therein.

Defendant offered in evidence exhibit "45" attached to transcript, certified copy of letter from Commissioner of General Land Office to Register Land Office of Council Bluffs, dated December 8, 1864, certified to by Register and Receiver at Des Moines Land Office. [Objected to by plaintiff as incompetent, immaterial and irrelevant,] viz:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"December 8, 1864.

"Register Land Office, Council Bluffs, Ia.:

Sir—In reply to your letter of the 23 ult. I have to state that selections of public lands by railroad companies, under act June, 1864, of the even numbered or idemnity sections within the limits of the several roads provided for in said act, will take effect from the time of filing such selections in the local land office. The odd numbered sections in the limits of the several roads inure to the state or companies from date of survey in in the field of the line of road.

"JOS. S. WILSON,
"*Acting Commissioner.*"

[Tr. pp. 639-40.]

Defendant offered in evidence exhibit "46," [attached to transcript, pp. 641-2,] certified copy of letter from

Commissioner of General Land Office to Register and Receiver of Land Office, Council Bluffs, dated August 25, 1864, and certified to by Register and Receiver at Des Moines Land Office. [Objected to as above,] as follows:

"GENERAL LAND OFFICE, Aug. 25, 1864.

"GENTLEMEN—In pursuance of instructions from the Secretary of Interior, under date of the 24th inst, the order of the 16th, of June last, withdrawing from sale the public lands in Iowa, is modified so that entries may be made under the homestead and pre-emption laws as before that order was issued, and you will allow such entries to be made accordingly.

"JOS. S. WILSON,

"*Acting Commissioner.*"

"Register and Receiver, Council Bluffs, Iowa."

Defendant offered in evidence exhibit "47," [attached to transcript, pp. 643-4,] certified copy telegraphic dispatch from Acting Commissioner of General Land Office to Register and Receiver, Council Bluffs, dated Aug. 26, 1864, certified to by Register and Receiver at United States Land Office, Des Moines, Iowa. [Objected to as above,] and as follows:

COUNCIL BLUFFS, Aug. 27, 1864.

[By telegraph from Washington, Aug. 26, '64]

"To Register and Receiver, Council Bluffs, Ia.:

The lands in your district are to be treated as open to homestead and pre-emption.

"JOS. S. WILSON,

"*Acting Commissioner.*"

Defendant offers in evidence certified copy of letter from Commissioner of General Land Office to Register and Receiver at Council Bluffs, dated July 6, 1866, (attached to transcript as exhibit "48)," and hereinbefore

set out in plaintiff's testimony as exhibit "18." (found on pp. 55–6 of this abstract, tr. pp. 647–8).

Defendant offers in evidence certified copy of letter from Commissioner of General Land Office to Register and Receiver, Council Bluffs, dated November 11, 1867, (attached to transcript as exhibit "49,") and hereinbefore set out as exhibit "22" (found on p. 58 of this abstract, tr. pp. 649–50).

Defendant offers in evidence certified copy of Notice No. 711, from land office (attached to transcript as exhibit "50,") and hereinbefore set out as exhibit "C," attached to deposition of Wm. T. Steiger. [Found on page 121 of this abstract, tr. pp. 651–4.]

Defendant offers in evidence certified copy of letter from Commissioner to Register at Council Bluffs, Iowa, dated Nov. 1, 1867, attached to transcript as exhibit "51" certified to by Register and Receiver, at Des Moines Land Office. [Objected to by plaintiff as above.] and is as is follows:

"Department of Interior,

"General Lend Office, Nov. 1, 1867.

"Sir- Referring to your letter of the 21st ult. I have to state that the newspaper Council Bluffs Weekly *Nonpariel*, therein alluded to as embracing a public notice of the time upon which certain lands therein described, situated in your district, will be brought into market, has not reached here. You will be pleased to forward a copy of it by return mail.

"In your answer to this letter you will please to refer to it as 'C,' by its date.

"Frank Street. "Jos. S. Wilson,

"*Commissioner.*

"Register at Council Bluffs, Ia." [Tr. pp. 655-6.]

Defendant offers in evidence certified copy of letter

from Commissioner of Land Office to Register and Receiver, Council Bluffs, as follows.

"DEPARTMENT OF INTERIOR.

GENERAL LAND OFFICE, Aug. 5, 1867.

"GENTLEMEN In reference to the lands in your district, which were withdrawn from private entry for railroad purposes the 23d of June, 1864, ordered to be re-restored thereto on October 1st, 1866, per printed notice No. 711, and the restoration of which was postponed by order of the Secretary of the Interior for one year from July 5, 1866, the date of the notice, as per our letter to your office of September 21, 1866, I have to state that the period of the postponement expired on the 5th ultimo, but the lands will not be subject to ordinary private entry until the usual thirty days' public notice thereof shall be given by advertisement in some newspaper of general circulation in your district. This you will do without delay, and forward a copy of the newspaper containing the advertisement to this office.

"JOS. S. WILSON,

"Register and Receiver, Council Bluffs." [Tr. p. 645.]

Defendant offiers in evidence certified copy of letter from Commissioner of General Land Office to Frank Street, Register and Receiver, at Council Bluffs, Iowa, dated October 21, 1867, attached to transcript as exhibit "52," certified to by Register and Receiver, United States Land Office at Council Bluffs, Iowa. (Objected to as above.)

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE, Oct. 21, 1867.

"GENTLEMEN In answer to your letter of the 10th inst. respecting the destruction by fire of certain public property, etc., pertaining to your land district, I have to state that duplicates of the lists of swamp and railroad

selections are now being prepared, and will be forwarded to you at the earliest date practicable. Upon your advising this office of the particular kind of blanks required they will be promptly transmitted.

"Jos. S. Wilson,

"*Commissioner.*"

"Register and Receiver, Council Bluffs, Iowa." (Tr. pp. 657-8.)

Defendant offered in evidence certified copy of letter from Commissioner of General Land Office to Register and Receiver of Land Office at Council Bluffs, Iowa, dated June 16, 1864, attached to transcript as exhibit "53," and certified to by Register and Receiver at United States Land Office, Council Bluffs, and is hereinbefore introduced by plaintiff and set out as exhibit "13." (Found on p. 49 of abstract, tr. pp. 659–60).

Defendant offered in evidence certified copy of petition in equity of the C. R. & M. R. R. R. vs. Woodbury county; B. F. Smith, County Treasurer, J. S. Easly, John Peterson, and J. C. C. Hoskins filed in Woodbury County District Court, March 18, 1869, and amendment thereto, filed July 22, 1869, attached to transcript as exhibit "54." (Objected to by plaintiff as incompetent, immaterial and irrelevant), and is as follows:

That said C. R. & M. R. R. R. is a corporation under laws of Iowa; that it has constructed its main line of railroad from Cedar Rapids in Linn county to Missouri River, near Council Bluffs. That the different parts of said line were constructed from 1861 to 1867 as shown by statement attached to petition as exhibit "A." That by the act of Congress of May 15, 1856, and the act of Iowa Legislature March 26, 1860, petitioner became entitled upon building said road, and, to aid in its construction, a quantity of United States public lands, equal

to six sections to the mile for each mile of the road, built in accordance with said laws, provided such amount of land of the kind named should be found in the odd numbered sections lying within 15 miles of said road, as laid down on the map thereof, filed in General Land Office of the United States by the Iowa Central Air Line Railroad Company about 1857. That the amonnt of six sections to the mile for each mile of the road of the kind of land described was not found within 15 miles of said railroad, in odd numbered sections, and Congress, by act of June 2, 1864, enacted that petitioner might modify the uncompleted line, as shown by the map aforesaid, and that "the Secretary of Interior shall reserve and cause to be certified and conveyed to petitioner, from time to time, as the work progresses, on main line out of any public lands now belonging to the United States, not sold, reserved or otherwise disposed of, or to which a pre-emption right, or right of homestead, settlement has not attached, and on which a bona fide settlement and improvement has not been made under color of title from the United States, or from the State of Iowa, within 15 miles of original main line, an amount of land equal to that originally authorized to be granted to aid said road by said act, to which this is an amendment, and if the amount of land per mile, granted by said original act to aid said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selection may be made along said modified line, and connecting branch within twenty miles thereof."

That under instructions issued by Commissioner of Land Office to Registers and Receivers of Land Offices, dated May 30, 1866, and approved by Acting Secretary of Interior, June 6, 1866, petitioner was required to ap-

point agents to select the lands claimed by it, in the several land districts in Iowa, accruing to it under act of June 2, 1864.

That in accordance with said instructions petitioner appointed agents to make such selections in the four land districts of Iowa, through which said railroads runs, and selections were made by such agents, and certified by Register and Receiver in 1866, as follows.

In Des Moines District, 21,832 58-100 acres.

In the Fort Dodge District, 38,764 54-100 acres.

In the Council Bluffs District, 139,365.74 acres.

In the Sioux City Disirict, 191,438 62-100 acres.

The amount previously certified to State to aid said railroad and inuring to petitioner under act of General Assembly, March 26, 1860, is about 775,444 19-100 acres, and this amount includes 20 sections sold by Iowa Central Air Line Railroad Company before passage of act March 26, 1860, and also includes what is commonly called Des Moines River Lands, certified April 7, 1873, by Commissioner and Secretary of Interior, as inuring to petitioner under act of May 15, 1856, amounting to about 109,000 acres, but held by Supreme Court of the United States in case of Wolcott vs. Des Moines Navigation and Railroad Company (5 Wallace, 681,) not to have passed to State under act of May 15, 1856.

That of said selections made in 1866, there were certified to petitioner by certificate of Commissioner of Land Office July 11, '68, approved certificate of Secretary of Interior, dated July 17, 1868, about 136,416 41-100 acres of said lands in Council Bluffs District and in Sioux City Land District; there have been certified to petitioner of said selections, under act of June 2, 1864,, 190,305 30-100 acres; and under act of May 15, 1856, 640 acres; certified under date of July 17, 1868, by Commiss-

ioner and by Secretary of Interior July 18, 1868. Petitioner avers on information that the lands certified as aforesaid, included all the lands in said Council Bluffs and Sioux City Districts, which the Secretary of Interior will or ought to certify to petitioner, under act of June 2, 1864.

Avers on information that, up to the present time, no definite or final action has been had by the Secretary of the Interior upon said lists of lands selected in Des Moines and Fort Dodge Land Districts, and that there are lands in said two districts, and included in said lists which will be certified to petitioner, under act June 2, 1864, when said Secretary shall finally act thereon.

Petitioner appends to petition as exhibits "B," "C" and "D," copies of lists of lands in Sioux City District, certified as aforesaid.

That by reason of the premises and certification by the Secretary, as showa by said lists, the lands in exhibits "B," "C" and "D," are the land of petitioner, and petitioner has had ownership and title thereto since the date of said certificate July 18, 1868, and before the making of said certificate, said lands were the lands of the United States, and that none of said lands in said exhibits "B," "C" and "D," had ever been certified or conveyed by the United States to the State, or to petitioner before the making of said certificates, and that previous to July 18,1868 petitioner never exercised any acts of ownership over said lands, nor asserted any title thereto, either by offering the same for sale or otherwise.

The petitioner then proceeds to state that the county of Woodbury assessed and levied taxes on a portion of said lands described in exhibits "B," "C" and "D," for 1867 and 1868, and the same were sold by defendant Smith, as County Treasurer, in October, 1868, for taxes

of 1867, and that the defendants Easly, Peterson, Hoskins, purchased portions of said land at said tax sale, and petitioner claims and alleges that said lands were not taxable till 1869, and ask that the said sale be set aside and canceled, and certificates issued thereunder canceled, and the levy of taxes for 1868, be set aside and canceled. (Tr. pp. 661-76.)

Exhibit "A," attached to the petition, is as follows:

A statement of progress of the C. R. & M. R. R. R., and the times at which the different portions were finished. The act of the State giving the lands to the C. R. & M. R. R. R. was passed March 26, 1860.

The year of 1860 was spent in making surveys and locating line to Marshalltown.

Dec. 1, 1861, 40 miles of road was completed to Otter Creek Station, now Chelsea.

December 12, 1862, 70 miles completed to Marshalltown.

In 1863, road completed to State Center, 85 miles.

July, 1864, finished to Nevada, about 100 miles from Cedar Rapids,

In March, 1865, road was finished to Boone, about 122 miles from Cedar Rapids.

In April, 1866, Des Moines River bridge was completed; track laid to west bank of Des Moines River, about 128 miles from Cedar Rapids.

Jan. 1, 1867, the road was completed to Honey Creek Station, 16 miles from Council Bluffs, about 252 miles west from Cedar Rapids.

Jan. 22, 1867, road was finished to Council Bluffs, about 268 miles from Cedar Rapids.

Feb. 5, 1867, the whole line was laid and operated to the bank of the Missouri River, opposite Omaha, 271 6-10 miles from Cedar Rapids.

In 1863, 1864 and 1865, the railroad from Marion to Cedar Rapids, about six miles, was built by the Dubuque and Southwestern Railroad Company, under an arrangement between that company and the C. R. & M. R. R. R.

In the summer of 1867, about six miles of railroad, called the Onawa branch connecting main line of C. R. & M. R. R. R. at Missouri Valley, with Sioux City and Pacific Railroad, at California Junction.

The Lyons branch, owing to the opposition of the City of Clinton, and divers injunctions issued at the suit of said city, was not built until the fall of 1868; the track of road between cities of Lyons and Clinton laid late in fall of 1868, but owing to frost, track was not completed, and is not yet entirely finished, but is now nearly completed, and is two and one-half miles long.

(Tr. pp. 677-9.)

Exhibit "B," attached to petition, is a supplemental list of lands selected by C. R. & M. R. R. R. in Sioux City District, under act of May 15, 1856, six-mile limits, dated July 17, 1868. (Tr. pp. 679-82.)

Exhibit "C," atttached to petition, is a supplemental list of lands selected by C. R. & M. R. R. R., under act of May 15, 1856, in Sioux City District, outside of six and within 15-mile limits, dated July 17, 1868.

Tr. pp. 683-6.

Exhibit "D," is a supplemental list of lands selected by C. R. & M. R. R. R. Co., in Sioux City Land District, under act June 2, 1864, within fifteen-mile limits, dated July 17, 1868. (Tr. pp. 689-708.)

The amendment to said petition, filed July 22, 1869 was as follows.

That since petition was filed the Secretary of the Interior has taken final action upon the list of lands in

Fort Dodge and Des Moines Districts, and certified to by complainant in Des Moines District, 14680 56-100 acres of lands so selected, and in Fort Dodge District, 3,515 91-100 of lands embraced in said selected lists and no more. (See Tr. p. 709.)

Defendant offered in evidence certified copy of circular of instruction of the United States Land Department (as exhibit "55," attached to transcript, pp. 714-38), certified to by Clerk of District Court of Woodbury county, Iowa, as complete copy of same as attached to papers in case of Cedar Rapids and Missouri River Railroad vs. Woodbury county et al. (objected to by plaintiff as incompetent, immaterial and irrelevant), and is as follows:

[Circular No. 9.]

Grants from Congress to States and corporations:

"DEPARTMENT OF THE INTERIOR,

"GENERAL LAND OFFICE,

May 30, 1866.

"GENTLEMEN:—By the first section of the act of Congress, approved July 1, 1864, (Statutes, 1863–4, page 335, chap. 198), it is provided that from and after the passage of that act the location of lands by States and corporations under grants from Congress for railroads and other purposes (except for agricultural colleges), the registers and receivers of the land offices for the several states and territories in the districts, where such lands may be located, for their services therein, shall be entitled to receive a fee of $1 for each final location of 160 acres, to be paid by the State or corporation making such location, the same to be accounted for in the same manner as fees, etc., on warrants and pre-emption locations, with limitation as to maximum of salary pre-

scribed by existing laws, in accordance with such instructions as shall be given by Commissioner of General Land Office.

"1. Under this law the registers and receivers each are entitled to receive $1 fee for each final location of 160 acres, or any quantity approximate, thereto when deficit is less than 40 acres.

"2. When the several quantities shall have been definitely ascertained by you as to inure to the grant, as hereinafter prescribed, the fees will be due.

"3. The State through its grantee, or the grantee, as the case may be, is required to file with the Register and Receiver descriptive lists of the tracts of land claimed as inuring under the grant within section of.... miles each, along the line of route on both sides thereof, to be dated and verified by the signature of selecting agents; or agent's certificate to be attached to each list see form "A." The party appearing as the agent of the grantee must file with the Register and Receiver written and satisfactory evidence, under seal, showing authority to act. In preparation of lists Register and Receiver will afford agent all reasonable facilities, taking care not to interrupt current public business. The lists must be carefully examined by the Register and Receiver; their accuracy tested by the plats and records of the office; when so examined and tested and found correct in all respects to be a final location, and you will on payment of the fee so certify at foot of each list according to form "B."

"After lists have been examined and your certificate attached, same will be consecutively numbered from No. 1, for each railroad or separate grant. Upon payment of fees and certification of lists the Register will post selections in tract book, after following manner:

"Selected 186...., by A. B., agent for the....Railroad Company, act....list No.....," and on the plats he will mark the selected tracts "R. R."

"After selections are posted and marked, the lists will be transmitted to this office with the evidence of agent's appointment.

"4. The fees will be due in all cases where the service may be rendered subsequent to act of 1864.

"5. The Recorder will account for the fees paid in, in his monthly and quarterly accounts, setting forth in the same particular case or cases on which the fees accrued, giving name of road, number and date of list for which they were paid.

"6. By joint resolution No. 10, of January 30, 1865, "mineral lands" are not embraced in the grant made at the first session of the 38th Congress, unless otherwise specially provided in the act or acts making the grants.

"PACIFIC RAILROADS.

"Acts approved July 1, 1862, and July 2, 1864:

"7. By section 21 of the latter act these companies are required to pay the cost of "surveying, selecting and conveying" the lands in addition to the fee, exacted by act of July 1, 1864, before mentioned. To ascertain the costs of surveying, which includes both surveying in the field and office work, the company will apply to the Surveyor-General of the State or Territory in which the lands are situated. Upon ascertaining the sum due for "selection or selections of road," for which selections have been or are to be made, a deposit of those sums must be made to the credit of the Treasurer of the United States with an authorized depository. The duplicate certificate of deposit must be filed with the Surveyor-General, whereupon he will transmit to Register and Receiver of proper land office his certificate

of payment, specifying amount for surveying and office work, as per form "C."

"The Suveyor-General certificate, together with duplicate certificate of deposit, and evidence of agent's appointment, must accompany the lists of selections when transmitted by you to this office.

"8. Herewith is a form of title page to be prefixed to lists of selections. Let me call your special attention to the necessity of great care in the examination and testing of these lists, so that conflicts may be avoided and improper selections excluded, and that the verified schedules may be accurate, and avoiding embarrassment and delay to all concerned.

When the verified lists are received at the General LandOffice, prepared and certified,as above required, such definitive action as the law requires will be here taken with a view to invest grantee with a complete title. These instructions will supercede those of the circulars of Nov. 14 and Dec., 1864.

"Please acknowledge receipt of this circular, giving date of reception.

"J. M. EDMUNDS,

"*Commissioner.*"

"To Register and Receiver of U. S. Land Office.

"DEPARTMENT OF INTERIOR,

"WASHINGTON, D. C., June 6, 1866.

"The foregoing rules are approved.

"W. T. OTTO,

"*Acting Commissioner.*"

(Tr. pp. 714-22.)

Form "A," attached to this circular, is form of agent's certificate to lists.

(Tr. p. 723.)

Form "B," attached to this circular, is form of cer-

tificate by Register and Receiver to selection lists.

(Tr. pp. 724-5.)

Form "C," attached to this circular, is form of Surveyor-General's certificate of payment of fees for survey etc. (Tr. pp. 725-736.)

Defendant offered in evidence act of Congress of July 1, 1864, with reference to railroad selections, viz:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, in the location of lands by States and corporations, under grants from Congress for railroads and other purposes (except for agricultural colleges,) the Registers and Receivers of the land offices of the several States and territories in the districts where such lands may be located, for their services therein, shall be entitled to receive $1 for each final location of 160 acres, to be paid by the State or corporation making such location, the same to be accounted for in the same manner as fees, and commissions on warrants and pre-emption locations, with limitations as to maximums of salary prescribed by existting laws, in accordance with such instructions as shall be given by the Commissioner of General Land Office."

(Tr. p. 738½.)

Defendant offered in evidence a certified copy of record of deeds from C. R. & M. R. R. R. to I. R. R. L. C. attached to transcript exhibits "56" and "57," (objected to by plaintiff as incompetent, irrelevant and immaterial.)

These exhibits are two quit-claim deeds, made Sept. 15, 1869, by C. R. & M. R. R. R to I. R. R. L. Co. for lands in Monona county, described in said deeds, and also conveying by its terms "all other lands in said county of Monona, owned by said C. R. & M. R. R. R., which they

have received or may hereafter receive or become entitled to from the United States Government, or State of Iowa, or any of the counties of said State, in consideration of constructing or building said C. R. & M. R. R. R. or its branches, excepting and reserving, however, unto said first party all lands which it has sold or contracted to sell previous to date of deed; and reserving right of way to first party of 100 feet in width where line of road has been or may hereafter be located over and upon said lands. (Tr. pp. 739-758.)

Defendant offered in evidence a map showing the location of Air Line Central Railroad and Cedar Rapids and Missouri River Railroad, attached to transcript as exhibit "58." [objected to by plaintiff for the reason that it has not a proper certificate in this, that it is not under seal of Commissioner General Land Office. Second, does not purport to be a copy of any map on file in his office. Third, That the certificate is, with reference to a matter with regard to which Commissioner cannot certify, and for that reason it is incompetent, irrelevant and immaterial.]

Defendant offered said map under the stipulation hereinbefore referred to in abstract, that when a map is introduced by either party, certified by Commissioner of Land Office, it shall be competent for all the matters embraced in said certificates. [Said map is attached to transcript as exhibit '58,' and is made a part hereof, and referred to, but owing to the nature of the testimony cannot be set out in abstract.]

Defendant offered in evidence the Burdette letter or pamphlet and exhibits thereto [attached to transcript as exhibit "59."] The Burdette letter was also introduced by plaintiff, and is set out in full in this abstract, commencing on p. 40.

[Tr. pp. 760-770.]

Defendant offered in evidence the Lippencot letter and exhibits attached, which by stipulation of parties [tr. p. 141,] was made competent evidence of the matters stated, and may be introduced by either party, and is attached to transcript as part of exhibit "59," with Burdette letter, and is as follows:

"Department of Interior,

"General Land Office, Washington, D. C.,

February 4, 1876.

"Hon. Addison Oliver, House of Representatives:

"Sir—I am in receipt of your letter of the 27th ultimo, making further inquiries relative to the grant for the C. R. & M. R. R. R., under act of June 2, 1864. In compliance with your request, I return the map transmitted by you, with the date of filing the original, and the indorsements and certificates on said original map indorsed thereon. The original map, from which the copy furnished you is made, is the only one of the modified line on file in this office. It does not indicate the length of the line, and there is no evidence on file showing the length of the modified line. The map furnished you on the 19th ult. was made from the map of the modified line, filed July 11, 1865, and the map of the western terminus of the road filed Dec. 19, 1867.

"It appears that the road from Missouri Valley to the river is constructed on the line of the so-called 'Onawa Branch,' and not on the line indicated "D," "H," as laid down on the map filed July 11, 1865. I enclose copy of letter of Wm. Steiger, transmitting a map of the general route to the Secretary of Interior, dated July 5, 1865, and a copy of the letter of the Secretary of the Interior transmitting the map to this office, dated July 10, 1865, copies marked 'A,' 'B.' Enclosed please

find a copy of the certificate of Gov. Stone, dated July 2, 1867, for 271 6-10 miles of road, copy marked 'C.'

"From the information in possession of this office it is impossible to state whether the certificate covers all the road constructed by the company or not, or to state the termini of the road constructed; neither can the date of construction be given.

"There is a map filed in this office May 21, 1863, showing the first division of the C. R. & M. R. R. R. completed from Cedar Rapids to Marshall, 70 miles. Attached to this map is an affidavit of W. W. Walker, chief engineer, dated Dec. 23, 1862, in which he states that prior to Dec. 1, 1861, the company had completed and equipped two sections of 20 miles each of road west from a point on Cedar River, and that on the 20th day of December, 1862, the company had completed another section of 20 miles. This map was transmitted to the Secretary of the Interior by president of the company, with a letter dated Feb. 20, 1863, copy enclosed marked "D." There is also on file certificates of Gov. Stone, of Iowa, dated Oct. 21, 1864, stating the company had completed 60 miles of road, but date of completion is not given; copies of certificates enclosed 'E' and 'F.' I also enclose letter from John I. Blair, Jan. 20, 1865, marked 'G.' I would also state that from an estimate made by the draughtsman of this office, the distance from Cedar Rapids to Council Bluffs on the line of general route as filed in this office approximates 270 miles. This calculation is not given, however, as the exact number of miles of road completed.

"In addition to the map furnished you on the 19th ult. I transmit copy of the map of Onawa branch and Council Bluffs branch, filed Dec. 19, 1867, with endorsements thereon, together with a copy of the letter of

John I. Blair, president of the company, transmitting said map, Dec. 19, 1867, marked 'H.'

"These branches do not appear on the map of modified line filed July 11, 1865. It is proper to state that the map in this office was made on a reduced scale, by W. T. Steiger, agent of the company in this city, from the map furnished by Mr. Blair. The original map is in the possession of this office however, but it was not officially filed.

"The following statement will show when the lands were selected by the company, and the number of acres selected.

July 28, 1865....	4,395 acres.
August 15, 1866, ...	139,565 "
October 22, 1866, ...	191,438 "
August 29, 1867, ...	41,999 "
March 31, 1872, ...	2,258 "
July 26, 1872, ...	1,206 "
November 16, 1874, ...	859 "
December 12, 1874, ...	3,274 "
December 21, 1874, ...	4,707 "
October 15, 1875, ...	406 "

"The dates of approval were given in my letter of the 19th ult. in reply to your 4th question. It will be seen that a much larger quantity of land has been selected by the company than has been approved. On account of prior claims to the land many of the selections were rejected.

"You ask me to 'state whether there is any evidence on file in your office which shows where the modified line of said road begins or ends, or how long it is (and if so, append same), or any evidence by which you can tell how much land the company became entitled to under the grant of June 2, 1864, or how much road it

constructed under said grant of June 2, 1864, or which would enable the Secretary of the Interior to reserve any particular lands or amount of lands as inuring to said company, under grant of 1864, and if so, append the same.'

"There is no evidence showing where the modified line begins or ends, other than the map filed July 11, 1865, showing the termini to be Cedar Rapids and the Missouri River, together with the map of the western terminus of the road and the Onawa and Council Bluffs branches, filed December 19, 1867, which indicates that the western terminus of the line proper is Missouri Valley, from which point the two branches radiate. The grant in place was not enlarged by the act of June 2, 1864. The limits from which indemnity could be selected were enlarged, and, as stated in my letter of the 19th ult., it was estimated that there were 356,988 acres of vacant land from which indemnity could be selected under act of June 2, 1864.

"As before stated, the certificate of Gov. Stone, certifying to the construction of 271 6-10 miles, is the only evidence in this office showing the number of miles of road constructed by the company.

"The company still claim the right to make selections, and this right is recognized by this office. Under date of November 9, 1875, the company selected 800 acres, which have not been certified on account of your request that such action be suspended.

"In my letter of the 19th ult. in reply to your 4th question, I stated that there had been certified to the company, under act of 1856, 782,250 acres, and 349,683 acres under act of 1864, making in all 1,131,933 acres. From this amount should be deducted 109,756 acres, the amount which, though certified for the company, was,

by the decision of the United States Supreme Court, declared to inure to the prior grant for the improvement of the Des Moines River, together with 800 acres erroneously certified, as stated in my former letter, making an aggregate of 110,556 acres.

"Enclosed I transmit copy of your argument in the case of J. L. De Puy, H. W. Needles, et al., as previously requested by you.

"L. K. LIPPENCOTT,

(Tr. p. 771-4). "*Acting Commissioner.*"

Exhibit "A," attached to foregoing letter (tr. pp. 775-7), is as follows:

"WASHINGTON, July 5, 1865.

"Hon. James Harlan, Secretary of Interior:

"SIR:—I have the honor to transmit herewith the letter of W. W. Walker, Esq., vice-President C. R. & M. R. R. R., addressed to you on the 19th, together with the accompanying map, duly authenticated of the amended route of said road, from Cedar Rapids to the Missouri River, which I beg leave to place on file as the basis of the adjustment of the additional grant of 2d of June, 1864.

"The corporate seal of the company appears to have been inadvertently omitted on the certificate. I have this day written for a seal with authority to attach it, so as to obviate the necessity of returning the map for that purpose.

"WM. T. STEIGER,

(Tr. pp. 775-7). "*Agent, &c.*"

Exhibit "B," atttached to Lippencott letter (tr. pp. 779-81,) is as follows:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 10, 1865.

"Sir—I enclose herewith, for your information and appropriate action in relation thereto, a map, filed in

this Department, by Wm. T. Steiger, for W. W. Walker vice-president, showing 'the general route of the Cedar Rapids and Missouri River Railroad.'

"You will please return the map to this Department for filing.

"JAMES HARLAN,

"*Secretary.*

"The Commissioner of General Land Office.

(Tr. pp. 779-81).

Exhibit "C," attached to Lippencott letter, being certificate of Gov. Stone, July 2, 1867, was hereinbefore set out in plaintiff's testimony, as exhibit "24" (found in this abstract hereinbefore set out p. 59).

Exhibits "D," "E," "F" and "G" referred to in Lippencott letter, are not in the transcript, and were not introduced in evidence.

Exhibit "H," referred to in Lippencott letter, attached to transcript (pp. 783-5), is as follows:

"WASHINGTON, December 19, 1867.

"Hon Jos. Wilson, Commissioner General Land Officer:

"SIR:—I have the honor to enclose a map showing the western terminus of the C. R. & M. R. R. R. in Iowa, which I respectfully request may be attached to the map of definite location heretofore filed.

"J. I. BLAIR,

Prest. C. R. & M. R. R. R.

"Please acknowledge, directed to me, Blairstown, New Jersey. (Tr. 783-5).

Defendant offers in evidence report of Register of State Land Office for year 1871, which is attached to second deposition of J. Van Deventer in this case, and marked as there stated (see p. of tr. 463, objected to by plaintiff as incompetent and immaterial and irrelevant.) (See ab. pp.-105-6).

Defendant offers, in evidence certified copy of selection made by Bernhardt Henn, agent, under act of Congress, May 18, 1856, dated Sept. 4th, 1856, attached to transcript by defendant as exhibit "60," and hereinbefore set out by plaintiff (in transcript pp. 920-6), as exhibit "2," and found in this abstract as exhibit "2" p. 42.

Defendant offers in evidence letter from Commissioner of General Land Office, dated October 25, 1877, (attached to transcript as exhibit "61," pp. 927-30, objected to by plaintiff as incompetent, immaterial and irrelevant), and is as follows:

"DEPARTMENT OF INTERIOR,
"GENERAL LAND OFFICE, WASHINGTON, D. C.,
October 25, 1877.

"Hon. Addison Oliver, House of Representatives:

"SIR—I have the honor to transmit herewith certified copy of the letter from Bernhardt Henn, Esq., agent of the state of Iowa, dated Chicago, Ill., Sept. 4, 1856, as per request of Messrs. Monk & Selleck, dated Onawa, Iowa, 17th inst. That letter was an election by Mr. Henn, on behalf of the State, to take the odd sections in the 15-mile limits of the grant to said State for railroads in lieu of the odd sections disposed of within the granted limits; and is the only election of that character ever made by an agent of said State for the purposes named that can be found after diligent search of the records and files of this office.

"J. A. WILLIAMSON,
"*Commissioner.*"

[Tr. pp. 927-30.]

Defendant also offered in evidence statement of case and opinion in case of Williams vs. Baker, found on p. 144, in 17 Wallace, United States Supreme Court, here-

tofore introduced by plaintiff under the stipulation (and found in this abstract p. 135, tr. pp. 566-83.)

Wm. T. Boyd, witness for defendant testified:

Reside in Monona County; farmer and rancher. 42 years of age, am in possesion of n½ nw¼ 28, 38, 46, have been in possession 10 years, entered the land at the United States Land Office, Council Bluffs, in December, 1867; went into possession under this entry in Mar. 1868, and since then have continuously occupied said premises; was a house on it when I took it. I lived in the house; put in 20 acres of breaking; fenced 60 acres; put in crop; dug a well; built a stable; put out fruit trees worth $50; all in the summer of 1868; since then I have built a house, dug three wells, built stable, 100 feet of sheds, broke and fenced all the place, built a granary, etc. Improvements worth $2,000. I have a patent for said land, and here produce it, dated Jan. 15, 1873, marked exhibit "A." From March, 1868, to the date of said patent, my occupancy and possession of said premises were under my claim of said entry, and have so been since the receipt of said patent. I have claimed the right of possession and title to said land under such entry and patent during all of said occupancy. I first heard of the claim made by plaintiff to said land in Jan. 1877.

Question—State whether at the time of your entry, and at the time you made your improvements you believed said lands were at the time of such entry Government lands, and subject to entry? (Objected to as immaterial, and the remainder of the witnesses' testimony in chief, objected to by the plaintiff as immaterial at the time of taking the same.)

Ans.—I did.

At the time of making said improvements, and prior

to my entry, I knew nothing about a grant to plaintiff of any lands out of even numbered sections, nor as to said grant having been adjusted.

I served as a soldier during the rebellion four years and eight months.

CROSS-EXAMINATION

The first improvements I made upon this land was 20 acres of breaking in the summer of 1868. I hauled the rails and lumber for the improvements in the winter and spring of 1868. I had heard at the time that there were railroad lands in this county. I had an agent to make my entry at the land office.

(Tr. pp. 787-91.)

Exhibit "A," attached to this deposition is a patent from the Government to Wm. T. Boyd for n½ of nw¼ 28, 84, 46, dated January 15, 1873.

(Tr. p. 792)

Benjamin Herring, witness for defendant, testified as follows:

Age 52; residence Monona county, Iowa. I am in possession of e½ ne¼ 20, 84, 46; have been since 1865; entered the same as a homestead; made my application here before B. D. Holbrook, May 28, 1865, and the receipt from the Land Office in June 1865; I have occupied and lived upon it all the time as a farmer; built me a house in the summer of 1865; broke about five acres; next year I fenced 60 acres; broke 30 more acres; balance was broke within the next three or four years; made my stables and sheds in 1870; have material on hand for a barn; have three or four acres of groves, some of it 10 and some 6 years old; have an orchard of 60 or 70 apple trees; part of it 8 years old and balance set out since then; and have considerable small fruit. The land with improvements is worth $30 per acre. The land

with the improvements is worth $21 per acre more than it would be without them. I have my patent for this land, and have produced it as exhibit "A" to this deposition. From June, 1865, to the date of this patent my occupancy and possession of the said premises has been under my claim of homestead entry, and since the receipt of patent, under the patent. [The balance of the testimony of this witness in chief, was objected to at the time of taking the same as immaterial.] It was about a year ago when I first heard of the claim of plaintiff to said premises. Never heard of any claim made by plaintiff to said land prior to 1875; at the time of my entry and the time I made my improvements, I believe said lands were subject to entry, and been informed that they were Government lands. I was a soldier in the United States army during the rebellion from August 12, 1862, to March 24, 1865.

(Tr. pp. 793-7).

Exhibil "A," attached to this deposition is a patent from the Government to Benjamin Herring for e½ of ne ¼ 20, 84, 46, dated April 1, 1872.

(Tr. p. 798).

David Greenstreet, witness for defendant, testified as follows:

Age 44; reside in Monona County, Iowa; am farmer; am in possession of se¼ nw¼ and sw¼ of ne¼ 24, 85, 44; I entered the land as a homestead at Council Bluffs Land Office March 20, 1865; was in the army when I took the homestead; discharged November 1, 1865, went on homestead March, 1866; been on it ever since; put up a house, and broke six acres that season; fenced 20 acres; built stable and sheds, and afterwards built a new fence; set out about 40 apple trees, and small fruit; have one acre grove, 40 acres broken, under fence. Im-

provements worth $1,000. I have a patent for said land, dated January 15, 1873, and here produce it marked exhibit "A." My occupancy and possession of said land up to the receipt of said patent was under my claim of homestead entry, and since the receipt of the patent under said patent; during all of my occupancy I claimed the right of possession and title under said homestead and patent. [The balance of the testimony of this witness on the direct was objected to at the time of the same as immaterial.] I did not hear of any one having any claim on this land but myself, till plaintiff served notice on me January, 1877. I heard of no claim being made by plaintiff to my landprior to 1875. I believed the said land was Government land at the time of said entry, and at the time of making my improvements; and had heard that every even section was Government land. I was a soldier in the United States army during the rebellion and served three years. I understood at or before the time of making my entry that the railroad company owned every odd alternate section.

[Tr. pp. 799-803.]

Exhibit "A," attached to this witnesses' deposition is a patent from the Government to David Greenstreet for the se¼ of nw¼ and sw¼ ne¼ 24, 85, 44, dated January 15, 1873.

[Tr. p. 804]

Elijah W. Brooks—Age 58 years; reside Monona county, Iowa; occupation farmer; suppose I am in possession of w½ of ne¼ sec. 20, tp. 84, r. 46; entered it in May 28, 1865; Holbrook done the business for me; got certificate in June from Council Bluffs; presume I have been in possession of the land since May 28, 1865; have occupied the premises or caused them to be occupied since June 1865, as a farmer; built a house, small barn

and sheds; fenced into small lots; set out grove; the e improvements were made from time to time; set out 155 fruit trees last year; the land is worth $21 or $22 per acre over wild lands fenced 60 acres; all my breaking was done within 5 years after I took it; I have a patent for my land, and here produce it marked "A," and dated July 7, 1871; from May, 1865, up to receiving patent my occupancy and possession of said land was under my claim of homestead entry, and since then under patent; during all my occupancy I claimed right of possession and title under entry and patent.

(The balance of the testimony of this witness on direct was objected to as immaterial.)

About a year ago I first heard of plaintiff claiming the land. I think I did not hear of any claim made to it by plaintiff prior to 1875.

At the time I made entry and improvements I believed the lands at time of entry were subject to entry and had been so informed before making the entry.

I was a soldier in the United States army during the rebellion; discharged June 1, 1864.

CROSS-EXAMINATION.

I think I heard there were railroad lands in the county before I made my entry, and that they were on odd sections; heard it talked of in this way.

(Tr. pp. 805-10.)

Exhibit "A," attached to the deposition, is a patent from Government to Elijah W. Brooks, dated July 7, 1871, for w½ ne¼ sec. 20, 84, 46.

[Tr. p. 813.]

John T. Lake, a witness for defendant, testified as follows:

Age 56; reside in Monona county, Iowa; am a farmer am in possession of n½ of se¼, sec. 4, tp. 85, r. 42; have

been in possession since August, 1866; entered said land at Council Bluffs, Aug. 17, 1866, went into possession of said land under homestead in fall of 1866; have occupied it continuously ever since, except in winter of 1866 and 1867; dug a cellar in fall of 1866; put up a shanty that fall and framed timbers for a house. In spring of 1867 put up my house and had 14 acres broke in July, 1867, and lived in my house from May, 1867; had first crop in 1868; planted one-half an acre of cottonwood in 1868; in 1868 put out grape vines and currants, one-half acre of box-elder planted, $25 worth of apple trees and 60 fruit trees out; 32 acres broke on the place: the last was done 6 years ago; 40 acres fenced on two sides; have had crops on place as much as I was able since 1867 every year; my improvements are worth $500; I have a patent for my land, and here produce it, dated april 10, 1874, and mark it "A."

My possession and occupancy of the land up to receipt of patent was under my homestead and since then under my patent; I heard no claim by plaintiff or any one to the land prior to December last: heard no such claim prior to 1875; at time of my entry and making improvements I believe the lands were Government lands at the time of my entry.

[Tr. pp. 812-15.]

Exhibit "A," attached to this deposition, is a patent from the Government to John T. Lake, dated April 10, 1874, for n½ se¼ sec. 4, 85, 42.

[Tr. 816.]

Daniel T. Cutler, witness for defendant, testified as follows:

Age 36; residence Monona county, Iowa; am a farmer; am in possession of s½ nw¼, 10, 84, 46; have been for 11 years; entered them as a homestead August 12,

1866; made my application through Holbrook Bros., of Onawa

Holbrook Bros. were offering railroad lands for sale and it was my understanding they were plaintiff's authorized agents; went into possession of said land under homestead entry and commenced breaking Aug. 12, 1866; have occupied said premises continuously since Aug., 1866; the first year broke 5 acres; built house and stable; set out one acre of timber; put grove out the next spring; fenced 25 acres; second year broke 25 acres; have now 65 acres broke and 80 acres fenced; have carried on farming ever since I went into possession; the improvements put on the place are worth $1,000, and the place will sell for that much more than it would without them; I have a patent for the land; here produce it, dated Jan. 15, 1873, marked "A." From time of entry up to receipt of patent my occupancy of said land wrs under my claim of Homestead entry, and since then it has been under patent; during all my occupancy I have claimed right of possession and title to said premises under said entry and patent.

[The remaining part of this witnesses' testimony was objected to at the time as immaterial.]

I never heard of any claim by plaintiff or any one but myself to this land till last year; never heard of any such claim prior to 1875; at the time of my entry and making improvements I believed said lands were at time of entry Government lands; and subject to entry had been informed that they were Government lands; one of the Holbrooks told me I could take a homestead there, and I selected one and received my receipts.

I was a soldier in the United States army during the rebellion, served three years.

CROSS-EXAMINATION

Holbrooks offered to sell me railroad lands; I broke 5 acres of land in 1866.

(Tr. pp. 817-822)

Exhibit "A," attached to this deposition is a patent from Government to Daniel T. Cutler, dated Jan. 15, 1873 for $s\frac{1}{2}$ of $nw\frac{1}{4}$ 10, 84, 46.

(Tr. p. 811.)

Catherine M. Wooster, witness for defendant, testified as follows:

Age 38; reside in Monona county, Iowa; wife of Q. A. Wooster; myself and husband are in possession of the land involved in the suit of R. R. Co. vs. Catherine M. Wooster; have been in possession thereof since 1867; I have a patent for said land, and here produce it as exhibit 'A,' my husband entered the premises for me in my name in September or October, 1869; no knowledge of any other claim to the land at the time I entered the land; had no knowledge or notice of any other claim to this land until served with notice to defend in this suit.

CROSS-EXAMINATION.

The land was entered by private entry, have no means of knowledge as to the date, except by general recollection; my entry was made, I was informed, at Council Bluffs, by my husband; I made no examination myself of the records to ascertain about any adverse claim; do not know whether there was a map or plat in local land office showing the line of plaintiff's road and limits of land grant; did not examine any map or plat.

(Tr. pp. 840-42.)

Exhibit "A," attached to this deposition, is a patent from the Government to Catherine M. Wooster, dated May 16, 1870, for $e\frac{1}{2}$ of $sw\frac{1}{4}$, 12, 85, 43.

(Tr. p. 483).

Lewis Iddings, a witness for defendant testified as follows:

Age 36; reside in Monona county; farmer; am in possession of the land in the suit brought against me; went into possession in Oct., 1865, and have occupied them continuously ever since; entered them as a homestead about June 14, 1865; took possession by virtue of such entry; obtained patent for said land, and it is attached to the deposition as exhibit "A;" prior to obtaining patent my possession was by virtue of homestead entry and since then by virtue of patent; took said premises to make a home for myself and family; the land is all enclosed, except 3 or 4 acres; in fall '65 built a log stable; dug a well and bricked the same; made cattle-yards and sheds; in 1866 broke 30 acres and built a frame house; in 1867 fenced the broken lands and put in crops, and broke 15 acres more, and planted cottonwood trees for a wind-brake. In 1868 broke 25 acres more and put in a crop; in 1869 enclosed all the land now enclosed, and put in crop; put out forest trees and planted fruit trees; since 1869 have put in crops and made other improvements; the land without the improvements would be worth $8 per acre, and with them $20 per acre. I had no knowledge at any time since taking possession of said premises that plaintiff, any corporation or person, had any claim to said premises until I was served with notice in this case; had no knowledge of any claim to the land other than my own prior to 1874; it was currently reported that the land was subject to homestead entry at the time I made my entry, and I was so informed, and I aimed to have the plat from Land Office showing lands subject to entry. I employed F. A. Day to forward my homestead application to Land office at Council Bluffs.

CROSS-EXAMINATION.

The land was entered as a homestead; my means of knowledge as to dates is my general recollection of dates.

The entry was made at Council Bluffs through my agent. I made no examination of the records; don't know whether there was a map or plat at local land office showing plaintiff's line of road and the limits of land grant; did not examine said map or plat whether the land I entered fell within the limits of said land grant.

(Tr. pp. 845-50.)

Exhibit "A." attached to this deposition, is a patent from the Government to Lewis Iddings, dated Jan. 15, 1873, for n½ of ne¼ 6, 85, 42.

(Tr. p. 851.)

Quincy A. Wooster, witness for defendant, testified as follows:

Age 38; reside in Monona county; am a farmer; am husband of defendant in suit of Railroad Company vs. Catherine M. Wooster, my wife; myself and family are in possession of the land involved in said suit; have been in possession since about July 1, 1867; first went into possession under homestead entry, and held possession under homestead entry until about October, 1, 1869; since then under private entry of my wife; homestead entry was made about 2d July, 1867, in person at local land office at Council Bluffs; I made private entry for and in name of my wife in October, 1867; paid to receiver $200 therefor; took possession of this land about July 5, 1867; done some breaking; commenced a cellar and house; completed house October, 1869, and then moved in and have occupied it continuously ever since, and cultivated the land ever since. In 1868 or '69, I broke 26 or 30 acres; fenced it, and have from year to

year broke additional parts of the land, and now there are 65 acres under cultivation; have built granary, stables, sheds etc.; have planted 8 acres of premises to forest trees, fruit trees and shrubery; said premises are now all under fence; I believe the improvements are worth $1,600; had no knowledge or notice of any adverse claim to this land at the time either entries were made or while improvements were being made until about commencement of this action, at time of making first entry I was informed by Frank Street, Register of Land Office at Council Bluffs, that said lands were subject to entry; shortly before making second entry I was informed by Register and Receiver at said land office that said land was subject to entry; I have two maps purporting to have been sent out by plaintiff or Iowa Railroad Land Company, and purporting to show the lands claimed by them, and attached them to my deposition as exhibits "B" and "C;" to the best of my knowledge exhibit "B" come direct from company's office from Cedar Rapids in 1871 and '72, and exhibit "C" was either sent by mail from Cedar Rapids or left by railroad men in 1873 or '74. In May or June, 1865, I was at Council Bluffs Land Office and was shown by Register at that time what purported to be official plats of land, and, according to my recollection of said plats, the land in controversy was at that time Government land; when at land office in 1867, I again, to a certain extent, examined said plats and records and found nothing to lead me to suppose that there was adverse claim to said land, and I was assured by the officers that I had a right to enter the same, and both entries were made in good faith.

CROSS-EXAMINATION.

The land was entered at Council Bluffs, in 1867, for my wife in 1869; can't say that I made any more parti-

cular examination than to inspect-track or plat-book, by which I found said land to be vacant.

I have examined maps purporting to show location of railroad and the lands belonging to railroad company, but have never seen anything on said maps leading me to suppose that the land in controversy belonged to railroad company; can't now recall any particular time at which I made examination of any map or plat purporting to show the line of Air Line Railroad, and the limits of land grant; I don't know of my own knowledge by whom the maps I have testified about were prepared; there is no doubt in my mind but that I received one or both said maps by mail at my request from Railroad Land Department at Cedar Rapids. I am positive that a number of maps similar to the one marked "C" came into my possession during 1871-2 and '73; would not say positively that these identical maps were sent me by mail, but feel positive that during said years I received these or similar maps from W. W. Walker or C. H. Clark, or both of them. (Tr. pp. 852-9.)

Exhibit "B" and "C," attached to this deposition, are maps which it is impracticable and impossible to set out in abstact, and are attached to transcript pp. 860-1, and are hereby referred to.

G. H. Bryant, a witness for defendant testified in deposition, as follows:

Age 37; reside at Onawa, Monona county, Iowa; occupation now Treasurer of said county, and have been since Jan. 3, 1876; I know from the records and from some of the payments having been paid to me who has paid the taxes on lands in controversy.

The taxes on s½ nw 10, 84, 46, for 1873, 1874-5-6, were paid by D. T. Cutler, amounting in the aggregate to $58.51.

The e½ of ne¼ 20, 84, 46, was sold for tax 1875, Nov 6, 1876, and redeemed by B. Herring, April 20, 1877, by payment of $49.69, of which amount $16.62 was tax o 1875; $18.90 was tax of 1876, and $14.27 was penalty costs, etc.

B. Herring paid the taxes of 1872-73 and '74, amounting to $41.13.

The taxes on w½ of ne¼, 20, 84, 46, have been paid by E. W. Brooks, for 1871, '73, '74 and '75, etc., amounting in all to $70.65.

The taxes on n½ of nw¼, 28, 84, 46, have been paid by W. T. Boyd for 1873-4-5 and 1876, amounting in al to $50.36.

The taxes on n¼ se¼, 4, 85, 42, have been paid by John T. Lake, for 1874 and 1875, amounting in all to $14.47.

The taxes on se½ of nw¼ and sw¼ of ne¼, 24, 85, 44, have been paid by David Greenstreet, for 1874-5 and '76, amounting in the aggregate to $26.50.

The taxes on e½ sw¼ 12, 85, 43, have been paid by Q. A. Wooster, for 1871-2-3-4-5 and ,76, amounting in all to $68.29.

The taxes on n½ of ne¼, 6, 85, 42, have been paid by Lewis Iddings, for 1873-4-5 and '76, amounting in all to $35.63.

The taxes on sw of sw; 6, 84, 45, have been paid by P. G. Dundon, for 1874 and '75, amounting in all to $14.53.

No one excepting, as above specified, has paid taxes on these lands, and the above statement does not include road taxes paid in the township.

(Tr. pp. 873-885).

Chas. H. Holbrook, a witness for defendant, testified in deposition as follows:

Age 47; reside in Onawa, Monona county, Iowa; occupation surveyor; have resided here 20 years.

Don't know how far it is from Cedar Rapids to Missouri Valley on line of C. R. & M. R. R. R. I know mile post 330 is 2,442 feet west of Missouri Valley Station.

I think there are two roads—The Sioux City and Pacific and Cedar Rapids and Missouri River Railroads—that connects Missouri Valley with Council Bluffs; can't tell whether they, or either of them, extends to the bank of the Missouri River, opposite Omaha, from Missouri Valley to bank of Missouri River oposite Omaha is about 24 miles; from Missouri Valley to Council Bluffs is about 21 miles; my means of knowledge is distances marked on conductor's card, who had charge of train on said road.

The nearest mile-post west of Missouri Valley on line C. R. & M. R. R. R. is 330, and is 2,442 feet from the station. My means of knowledge is by measurement made by myself and assistant, with surveyor's chain.

Tr. pp. 894–6.)

Patrick Dundon, witness for defendant, testified in deposition as follows:

Age 45; reside in Monona county, Iowa; am a farmer; I am in possession of the land involved in the suit brought by Railroad Company vs. Patrick Dundon; I entered the land as a homestead; did not personally enter it at land office, but employed Holbrook to do the business. It was about August 14, 1866; I went into possession under my entry; commenced work on the land within six months after I made entry; have lived on the place all the time since the first year; I broke 15 acres and put up a house, sunk a well and fenced 20 acres; the third year I broke balance of the land and fenced it all in; I planted out about 6,000 trees

and $15 worth of fruit trees. In fourth year I sunk a pond 10 feet deep, 20 feet wide and 80 feet long, to drain my land, and put up cattle sheds, hay house, corn house, granary, wagon house, etc. I have patent for the land, and here produce it, marked "A;" before I received patent my occupancy was under homestead entry; the land without the improvements would be worth $2 per acre cash, and with them $15 per acre. I was informed before I made entry that this was Government land; never heard any claim to the contrary till this suit was commenced.

CROSS-EXAMINATION.

Mr. C. H. Holbrook was the agent through whom I entered this land; I made no examination or inquiry at local land office at Council Bluffs to see whether this land fell within limit of land grant of Air Line Railroad or the modified line, except through C. H. Holbrook.

I knew nothing about the grant at the time I made my settlement; when I first came into the county I heard of the railroad coming to Council Bluffs; may have heard where line was located but did not know anything about it; am acquainted with value of improved and unimproved land.

(Tr. pp. 909-16).

Exhibit "A," attached to this deposition, is a patent from Government to Patrick Dundon; dated April 10, 1874, for s½ of sw. 6, 84, 45.

(Tr. p. 919).

Albert J. Hathway, witness for defendant, testified as follows:

Age 21 years; resids in Monona county, Iowa; I have in my possession a map or plat showing the land claimed by I. R. R. L. Co. in this county; got it, I think, at Cedar Rapids in 1870 or '72; think I got it from an agent

there at the office of the I. R. R. L. Co.; his name was Clark, I think; think he is secretary of the company. I wanted to purchase a piece of land, and expected to get some purchasers probably; I wanted a list of their lands for sale; he gave me a circular and price on some of the pieces. I made a purchase at the time; both Clark and Walker were in the office. I done the business mostly with Clark.

CROSS-EXAMINATION

I purchased 40 acres at that time; I can't tell exactly what 40 it was; the clerk, I think, put down the different prices on the map; I said at the time that I might want to sell more; I might have a chance to sell more; I think Clark was Secretary of the Iowa Railroad Land Company; he was some officer; he issued the deed to me; think his name was on the deed.

I don't remember that Walker was having anything to do with this business.

(Tr. pp. 973-977.)

Thomas Hurst, witness for defendant—Reside in Monona county, Iowa; resided there 10 to 12 years.

I have a circular of the Iowa Railroad Land Company, and their plat of lands; got it from Cedar Rapids; wrote for it three years ago; I bought some of the land after I got this. I produce the plat and mark it exhibit "C" (Exhibit "C" will be found attached to transcript pp. 986-987.)

D. B. Holbrook, witness for defendant—Age 43; reside in Monona county. I have lived there about 20 years; acted several years ago as agent for parties in forwarding their applications to the land office to enter homesteads; it was in 1864 perhaps, and continued in 1865-6 and '67. We received lists from time to time from the Register and Receiver at Council Bluffs of lands

open to pre-emption and homestead entry; this information was conveyed to parties from time to time who applied to enter homestead and pre-emptions; applications were made out in our office and forwarded to register's office.

We received the certificates therefor from register and delivered them to the parties; parties seeking information as to lands open to homestead entry came to us, and we gave them such information as we received from the land officers; for that information we depended upon lists and letters that we got from the land office; could not tell, but think I forwarded no applications for lands where the lists did not show they were subject to homestead entry; I have represented the I. R. R. L. Co. and the C. R. & M. R. R. R. in the sale of their lands in this county; could not tell when I began; it was 6 or 7 years ago; don't know whether we sold any land prior to 1870 or not. We had prior to that time been receiving pre-emption applications for the land in behalf of railroad company; I never heard of any claim made by the company to the land in suits prior to 1874; have seen map sent to us by the I. R. R. L. Co.; I never saw on any of those maps any lands in controversy as belonging to the company. I received the maps from the railroad company for distribution.

CROSS-EXAMINATION.

These maps represented the lands that were for sale; I know nothing about the certifications. There were changes made to the maps from time to time, and additions. I don't know, as a matter of fact, that the lands are not put into market and sold until after they were certified under act of 1864; first offered the lands of railroad company for sale in 1870 in this county, perhaps in 1869.

These pre-emption filings were simply a statement that the holders would be entitled to purchase the land described at its appraised value when the land was put in market; for a certain length of time he would have a prior right to buy the lands when they were put in the market.

[Tr. pp. 1,008-15.)

John K. McCaskey—Reside in Monona county; am County Auditor; lived here 11 years. The Sioux City and Pacific Railroad runs into and through Onawa, Monona county; there is no other railroad; there is no road from, at or near a point near Denison, running to or through Onawa; Sioux City and Missouri Valley are the the termini of the Sioux City and Pacific Railroad; Denison is about 50 miles west of Missouri Valley.

CROSS-EXAMINATION.

My means of knowledge as to the termini of the S. C. & P. R. R. is that I was here when it was built; that was my understanding; I have no official knowledge; I know they run from Sioux City to Missouri Valley; there is no other part of that road called by that name, except this one running from Sioux City to Missouri Valley don't know who constructed the road from Denison west; I believe Blair was the principal man in constructing the S. C. & P. R. R.; he was also interested in the construction of the road from Denison west; he was largely interested in the construction of both roads; the Sioux City Railroad was constructed after the other, the next year after the railroad was constructed from Denison west; I don't know that I ever heard the Sioux City and Pacific called the Onawa branch; the trains on the Sioux City and Pacific connect with the trains running from Denison; the travel going east from this section goes over the Sioux City and Pacific Railroad from

Onawa to Missouri Valley, and thence by the way of Denison, and the freight cars of the Northwestern are frequently run over the line; such cars frequently loaded from this place. The Northwestern Railroad passes through Denison. This Northwestern Railroad is a division of the road from Cedar Rapids through to the Missouri River.

RE-DIRECT.

Know trains are loaded here for the Union Pacific Railroad. Never heard of the Onawa branch being built; heard that the Onawa branch was expected to be built from Denison. I have frequently traveled over the Sioux City and Pacific Railroad; have bought tickets from here to Sioux City, from here to Missouri Valley and from Missouri Valley here. My knowledge of the termini of the road is from traveling over the road.

CROSS-EXAMINATION.

Have bought through tickets from here to Council Bluffs; they are sold I presume from here to points east.

(Tr. pp. 1,016-23).

Exhibits "A" "B" and "C" referred to and attached to the foregoing depositions, are the maps testified to as having been sent out by the plaintiff with their list of lands marked thereon, and are attached to transcript and found on page 1,024.

It is here stipulated that defendant has the privilege of filing a copy of a map offered in said Herring case and attached to the transcript as exhibit "58;" the original map being now in the office of the Clerk of the Supreme Court of the United States and in case a copy

is not filed within 90 days the said map is not to be regarded as any part of the evidence offered.

Plaintiff makes the same objections as made to the map when introduced in said Herring case.

Anderson Jewell sworn testified as follows:

I am 37 years old. Reside in Monona county, Iowa. I am defendant in this action. I am in possession of the se¼ of sw½ sec. 28, tp. 83, r. 45, and have been since 1865 I came into possession by making application for a homestead, I think in Feb. 1865. Since when I have been in continuous possession. I fenced the land in summer of 1865, and broke 20 acres during that year. I built a house in July or August, 1868. In 1866 I broke the balance I planted 305 fruit trees now two to nine years old; also a number of forest trees now 6 or 7 years old. I planted 250 cottonwood trees, now about 40 feet high, some have died out. I have on north line 35 rods of willow hedge, now 5 years old; on the west I have 35 Lombardy poplar trees, and wire fence and picket fence part way. I have a corn crib 8x50, and a good drive well. The house built in 1865 was 16 feet square. In 1868 I built an addition 14x16, 1½ story high. In 1878 I made another addition, 18x20. I consider the improvements worth $1,600. I have a patent for the land, is dated July 7, 1871, and I produce it, and I mark it exhibit "A.". At the time I made the improvements and at time of my entry I believed the lands were Government lands and subject to homestead entry at the time I made my entry. I first heard of plaintiff claiming this land about a month before this suit was brought. I claimed the right of possession and title to said lands ever since I have been occupying it. I made application to enter said land to B. D. Holbrook who said it was Government land, and subject to homestead entry. About that

time I obtained from B. D. Holbrook a certificate stating that I should have the first refusal of certain R. R. lands when they were placed in market. I can't remember whether this was before or after I made my homestead entry. I afterwards purchased said R. R. lands through Holbrook.

All the testimony of the witness was objected to by by plaintiff at the time questions were propounded or incompetent and immaterial.

CROSS-EXAMINATION.

The land I bought of Railroad Company is the ne¼ of nw¼, 33, 83, 45. The certificate I received for first refusal of said land was signed by W. W. Walker. I applied to B. D. Holbrook to send and get the certificate for me. Holbrook was at that time practicing law in Monona county. At the time I made application for my homestead on the land in question, Holbrook was in Onawa; he was at the time making applications for people for homesteads, and was obtaining receipts from Council Bluffs Land Office. I don't know whether he was a Government officer or not, but supposed he had authority to take the applications. I have no knowledge as to his authority to make these applications. I have lived in Monona county since 1855; I do not know when the survey of the Air Line Railroad was made through Monona county; I don't know that there was ever a Railroad Surveyed through Monona county from the east. About the time I made the application to Holbrook for this certificate I learned that the land described in sec. 33 was railroad land. When I made application for the 40 acre tract I made application for more land, but Holbrook told me that the land in the odd section was railroad land. I commenced to live on my homestead in August

or September, 1865; I commenced setting out fruit trees in 1871.

(Tr. pp. 1107-1120.)

Jesse T. Davis testified:

My age is 51 years. Reside in Blair, Nebraska, and have resided twenty-six years in that county and am by occupation a lawyer. I was in the employ of the Sioux City & Pacific R. R. Company during 1868 and 1869 and a part of 1870 as attorney for said road in Washington county, Nebraska. The road runs east and west through the town of Blair.

There was a line of said road constructed from a point on the Nebraska side of the Missouri River, below the present crossing of said road, commencing at DeSoto, about four miles below the present crossing, but there was no crossing there. There have been different crossings from time to time since 1869, varying from one to three miles up and down the river from the present crossing but none of them intersecting with the lower or DeSoto line. These changes have been caused by the caving in of the banks of the Missouri River; the lower line has been abandoned for eight or nine years and the railroad rails and ties taken up and used elsewhere. Said lower line was constructed in 1869.

(Tr. pp. 1121-1126).

Defendant offers in evidence a map of the Sioux City and Pacific Railroad certified to by the Commissioner of the General Land Office as having been filed September, 1871, and bearing an indorsement of its adoption by said company on the 15th day of June, 1876, said certificate being signed by John I. Blair, President, and W. W. Walker, Secretary, attached to transcript as exhibit "6." From the nature of the map it is impossible to set it out in the abstract, but it is attached to the transcript where it can be examined.

The map is objected to by plaintiffs, as incompetent, immaterial and irrelevant.

Defendant offers in evidence certified copy of letter from Commissioner of General Land Office, dated January 24, 1865, to John I. Blair and Oakes Ames, being part of exhibit "7," as follows:

"DEPARTMENT OF INTERIOR,
"GENERAL LAND OEFICE,
"January 24, 1865.

"Mr. J. I. Blair and Oakes Ames, Agents C. R. & Mo. R. R. R.:

"I have the honor to acknowledge the receipt of your communication of 20th inst. enclosing your commission as agents, and two certificates of the Governor of Iowa, of the completion of sixty miles of the C. R. & Mo. R. R. R. which you state lies west of Cedar Rapids, and in accordance with the railroad grant by act of May 15, 1856, and by the state laws. These documents are placed on the files of this office, requiring no action at our hands, it not being required of this office. We take no heed of what the state may do in that respect, so far as our action is concerned in making out lists of selections and certifying the same, that being the condition of which the state must take cognizance herself, so as to avoid making sales not warrantable by law. All we have to do is to certify the selections lawfully made, leaving the state to fulfill the conditions the grant has imposed upon her, thereby avoiding the penalty of forfeiture and saving her vendees from being the recipient of invalid titles.

"JOS. WILSON,
"*Acting Commissioner.*"

(Tr. 1,132-3).

Defendant offers in evidence certified copy of letter from Commissioner General Land Office to Blair & Ames

dated Feb. 23, 1865, being a part of exhibit "7" as follows:

"GENERAL LAND OFFICE,

February 23, 1865.

Messrs. J. I. Blair and Oakes Ames:

Your communication of the 16th inst. is received, referring to your previous application for certain certified lists of lands along the completed portion of the C. R. & Mo. R. R. R. and to our reply of the 24 ult. You ask a review of our opinion as expressed in the letter of 24th, calling attention to the provisions of the act of June 2, 1864, especially to its 4th and 8th sections.

The 4th section of said act authorizes the C. R. & Mo. R. R. R. Co. to modify or change the uncompleted portion of its line, and to connect the same by a branch with the main line of the Mississippi and Mo. R. R. R. Co. That section provides further, that when said modified main line shall have been established or such connecting line located, the C. R. & Mo. R. R. R. Co. shall file in the General Land Office a map difiinitely showing such modified line and such connecting branch; and directs that the Secretary of the Interior shall reserve and cause to be certified and conveyed a certain amount of lands to the company from time to time as the work progresses on the main line, etc.

The above section does not, in the judgment of this office authorize the conveyance by certified lists of lands along the completed portion of said road, but only along the uncompleted part of the same whenever the company shall file the maps required by said section.

The 8th section of the aforesaid act provides that no lands shall be certified to either of the companies mentioned in the law, until the Governor of Iowa shall

certify to the Secretary of the Interior that said company has completed ready for the rolling stock, within one year from the 1st of July, next a section of not less than 20 miles from the present of terminus of the completed portion of said road, and in each year thereafter an additional section of 20 miles.

When the company shall comply with these provisions of the statute, and furnish the proofs therein required, it will be entitled to the number of sections per mile originally granted by the act of May 15, 1856.

So far as the act of June 2, 1864 deals with companies, its provisions are prospective, requiring no action by this office, until certain contitions precedent are complied with by the companies, this office as indicated finding nothing in the act requiring the Department to certify the lists of lands along the completed portion of said road, which have heretofore been certified to the state in aid of its construction.

J. M. EDMUNDS,
Commissioner.

(Tr. pp. 1132-6)

Defendant offers in evidence certified copy of letter from the Commissioner to Blair dated April 20, 1865, being a part of exhibit "7" as follows:

"GENERAL LAND OFFICE,
"April 20, 1865.

"J. I. Blair:

"In compliance with the request of yourself and Oakes Ames of the 3d ult. and that of Mr. Steiger of the 6th inst. I transmit herewith six certified copies of lists of lands heretofore certified to the state of Iowa, for the Iowa Central Air Line R. R. under act of May 15, 1856, as follows, viz.:

List No. 7.	Dubuque Dist. approved Dec. 27, 1858 6 mile limits,		1,809.74
" " 8.	Same 15 " "		3,998.57
" " 9.	Ft. Des Moines Dist. appr'd Oct. 24, 1869 6 mile limits.		12,824.01
" " 10.	Same, 15 " "		22,887.74
" " 11.	Ft. Dodge Dist. appr'd Dec. 27, 1858 6 mile limits,		576.00
" " 12.	Same, 15 " "		590,072.60

"I also transmit the following lists approved April 27, 1863, and filed here by Mr. Steiger, late agent of the Iowa Central Railroad Company, viz.:

List No. 36.	Ft. Des Moines Dist. within the 6 mile limits,	46,898.73
" " 37.	Same, 15 " "	49,387.16
" " 38.	Fort Dodge Dist. within 15 mile limits,	13,470.96

"You will please acknowledge receipt of above lists.

"J. M. EDMUNDS,

"*Commissioner.*"

Defendant offers in evidence a certified copy of notice for restoring to market certain lands signed by J. M. Edmunds, Commis ioner, dated July 5, 1866, which has been heretofore introduced in evidence as exhibit "C" to deposition of Steiger, ab. p. 121.

(Tr. 519 & 1,141.)

Defendant offers in evi ence letter from Commissioner General Land Office, of July 6, 1866, to Register and Receiver, Fort Dodge, Iowa, being part of exhibit "7," as follows:

"GENTLEMEN:—I herewith enclose two descriptive lists of lands in your district heretofore withheld from ordinary private entry for the adjustment of land grants to the State of Iowa for railroad purposes, the one list

embracing 102,907.99 acres held at the double minimum price of $2.50 per acre, the other 145,906.62 acres at the ordinary minimum price of $1.25. I also enclose herewith a copy of notice No. 711 of yesterday's date, under which these lands will again become subject to ordinary private entry, on Monday the 15th day of October, 1866, and the lands similarly situated in the other districts of the state at date therein specified.

"You will retain the said lists in your office open to the inspection of parties desiring to purchase.

"The enclosed notice you will cause to be published immediately in some newspaper of general circulation in your district, the publication to be continued at least once a week until the 29th of October next, the latest date fixed in the notice for the lands in any of the districts to be restored to market.

"Printed copies of the notice will be transmitted to you in a few days for distribution.

J. M. EDMUNDS,

"Commissioner"

Defendant offers in evidence as part of exhibit "7" circular No. 9, dated May 30, 1866, from Commissioner General Land Office hereinbefore set out in this abstract pp. 174-78, and found in transcript p. 1,133½.

Defendant offers in evidence certified copy of the appointment of Cyrus H. Street, July 21, 1866, as selecting agent being part of exhibit "7," as following.

OFFICE OF C. R. & MO. R. R. R.

CEDAR RAPIDS, IOWA,

July 21, 1866.

To Register of United States Land Office, at Council Bluffs, Iowa, and whom it may concern.

This certifies that Cyrus H. Street of Council Bluffs in the State of Iowa, is the agent of the C. R. & Mo. R.

R. R. Co. to select and locate lands for said company, within the United States Land District subject to sale and location at Council Bluffs, Iowa.

Witness the Vice Pre-ident and Secretary of said company and seal thereof, this, etc.

SEAL.

W. W. WALKER,
Vice Pres. and Sec'y.

Defendant offers in evidence a certificate of said Street, dated Aug. 15, 1866, being part of exhibit "7" as follows:

The undersigned under and by virtue of the act of Congress, approved June 2, 1864, entitled "An Act to amend an act, entitled An act making a grant of lands to the state of Iowa, in alternate sections to aid in the construction of certain railroads in said state, approved May 15, 1856," and under and in pursuance of the rules and regulations prescribed by Commissioner of General Land Office hereby makes and files the following list of selections of public lands claimed by the C. R. & Mo. R. R. as inuring to it and to which it is entitled under and by virtue of the grant and provisions of said act of June 2, 1864, and the location of the line of the route of said railroad by said company, being for the odd and even numbered sections within 20 miles of the same which have not been selected under the grant of May 15, 1856, and which do not inure to the Miss. & Mo. R. R. R. Co. under either of said acts commencing at east of range 34 and ending at Mo. River.

The selections being particulary described as follows, to-wit:

C. H. STREET.

Defendant offers in evidence affidavit of said Street attached to said list.

STATE OF IOWA,
COUNTY OF POTTAWATTOMIE. } ss.

I, C. H. Street being duly sworn depose and say that I am the land agent of the C. R. & Mo. R. R. R. Co.; that the foregoing list of lands, which I hereby select is a correct list of a portion of the public lands claimed by the said C. R. & Mo. R. R. R. Co. as inuring to it, to aid in the construction of said road from the Mississippi to the Missouri river, for which a grant of lands was made by the act of Congress, approved June 2, 1864, and that the said lands are vacant, unappropriated and are not interdicted, mineral, nor reserved lands, and are of the character contemplated by the grant being within the limits of 20 miles on each side of the line of route for a continuous distance of 105 miles being for 5 sections of said road, starting from east side of range 4 and ending at Missouri river.

C. H. STREET,
Agent.

(Tr. p. 1148.)

Defendant offers in evidence as a part of exhibit "7" a certificate, dated Aug. 15, 1866, of United States Land Officers, at Council Bluffs, attached to said list, certifying said list is correct and that it is allowed and approved, and that the lands are surveyed public lands of the United States and that the same are within the 20-mile limit on each side and that there are not any valid adverse claim thereto and that fees are paid.

(Tr. 1149.)

Defendant offers in evidence as a part of exhibit "7" certified copy of appointment of T. J. Stone as selecting agent, dated Sept. 22, 1866, as follows:

OFFICE OF C. R. & Mo. R. R. R.
September 22, 1866.

"To Register and Receiver United States Land Office, Sioux City, Iowa:

"This may certify to you and to whom it may concern that T. J. Stone, of Sioux City, Iowa, is the duly

appointed agent of C. R. & Mo. R. R. R. to make selections of the lands at your office to which the said R. R. is entitled in your district under the act of June 2, 1864, granting additional lands to said railroad company.

"Witness, &c.,

"W. W. WALKER,

SEAL.

"*Vice Prest. and Sec'y.*

Defendant offers in evidence as part of exhibit "7," a certified copy of statement and affidavit as to selection of lands made by T. J. Stone, for said C. R. & Mo. R. R. Co. within the 15 mile limits of the original main line of said road on each side thereof which is of the same form as the statement and certificate of C. H. Street before set out.

Defendant offers in evidence certified copy dated October 21, 1866, of certificate of local officers of U. S. Land Office at Sioux City certifying that the list of lands so selected by T. J. Stone is correct and the filing thereof allowed and approved, and that the said lands are surveyed public lands of the United States and are within the limits of 15 miles of the original main line on each side and that there is no valid adverse claim thereto, and that the fees are paid.

(Tr. 1,152-56).

Defendant offers in evidence a letter from Commissioner to J. H. Morris, dated Dec. 6, 1869, being a part of exhibit "7" as follows:

"GENERAL LAND OFFICE,

"December 6, 1869.

"J. H. Morris, Onawa City, Iowa:

"In reply to yours of 22d ult. respecting homestead entry by C. K. Conde for se of se¼ 34, 83, 45, I state that upon examination, said tract is found to fall outside of the northern 20 mile limits set apart by the act of 2d of

June, 1864, for the amended line of the C. R. & Mo. R. R. R., and therefore said entry is proper and legal, so far as shown by returns to this office.

"JOS. WILSON,
"Commissioner."

(Tr. 1157).

Defendant offers in evidence decision of Secretary of Interior, dated July 29, 1871, being a part of exhibit "7" as follows:

WASHINGTON, D. C.
July 29, 1871.

Sir—Under date of 28th inst. the Assistant Attorney General rendered an opinion in case of J. W. Anderson vs. C. R. & Mo. R. R. R. D s Moines Office, Iowa.

Anderson entered the s½ ne; 34, 84, n. r. 30 w under the homestead law, March 23, 1865. The Assistant Attorney General holds that the right of th R. R. Co. did not attach until their map of definite location was filed July 11, 1865, and that the homestead entry being of prior date, it should be restored. I therefore direct that the homestead entry of Anderson be reinstated.

The papers with your letter of the 19th inst. are herewith also copy of said opinion.

"C. DELANO,
Secretary.
W. DRUMMOND,
"Commissioner."

(Tr. p. 1158.)

Defendant offers in evidence decision of Assistant Attorney General, dated July 28, 1871, being a part of exhibit No. "7" as follows.

WASHINGTON, July 28, 1871.

Sir—I have examined the case of Joseph W. Anderson vs. C. R. & Mo. R. R. R. Co. involving the right to s½

ne¼ of sec. 34, t. 86, r. 30, w. Anderson March 2?, 18??, entered the land in controversy as a homestead.

On Dec, 10, 1868, the Commissioner of General Land Office ordered a cancellation of the homestead entry on the ground that it conflicted with the prior claim of the C. R. & Mo. R. R. R. Co. From this decision Anderson appealed.

The act of May 15, 1856, (11 stat. p. 9) granted to the state of Iowa for the road subsequently known as the C. R. & Mo. R. R. R. Co. every alternate section of the public land, designated by odd numbers for six sections in width on each side of said road, with the right of idemnity in the alternate sections nearest to the tiers of sections above referred to within 15 miles.

A map of the general route of the road was filed June 18, 1857, on the second day of May, 1863, on amended map was filed showing the route from Cedar Rapids to Marshall.

The act of June 2, 1864, (13 stat. 96 sec. 4,) provided that the company might modify or change the location of the uncompleted portion of its line as shown by the map then on file in the Government Land Office, and granted for such modified line, the "same lands" and "the same amount of lands per mile" as originally granted in aid of the main line. This act also gave the right of idemnity in "any public lands" not sold, reserved, etc. within 15 miles of the original main line, and if such land could not be found within fifteen then it could be taken within the limits of twenty miles.

This section also required upon change of its line, that the company should file a new map of its modified route.

This was done July 11, 1865, the map then filed showed the modified line of the road from Marshall westwardly to the Missouri river.

The land in controversy is west of Marshall on the modified line, and is included in the indemnity limits of the act of 1864. The grant to this road under the act of 1864 upon the modified line, took effect from its definite location, July 11, 1865, under the act of 1856, the company had no right to indemnity in any case, in even numbered sections. Their right was acquired by the definite location of the modified line on the day mentioned.

Before that date, to-wit: on the 23d day of March, 1865, the homestead right of Joseph W. Anderson attached: and the land covered by it was therefore reserved from the grant to the road.

I recommend that the decision of the Commissioner be reversed and the homestead entry of Anderson be restored.

W. H. SMITH,
Asst. Att'y Gen'l.
C. DELANO,
Sec'y of Interior.

[Tr. pp. 1159-60.]

[Plaintiffs object to the introduction of exhibit No. "7" on the grounds that the same is incompetent and immaterial, and to circular No. 9 embraced therein, for the reason that the same purports to have been issued after plaintiff's rights accrued to said land and objects to the notice of restoration of lands to market ofiered in evidence by defendant for the reason that the same purports to have issued after the plaintiff's rights to said land accurued. Plaintiff interposes the same objections to the descriptive lists of lands forwarded from the department, and objects to so much of said exhibit No. "7" as contains and purports to be a report of a decision of the Secretary of the Interior for the reason that

plaintiffs herein are not parties to said record and in no manner bound thereby, and that the same and the decision of the Assistant Attorney General is incompetent and immaterial.

It is agreed that the record shows that defendant's homestead entry was made Feb. 6, 1865.

Defendant offers in evidence an act of Congress approved April 21, 1876, entitled "An act to confirm homestead and pre-emption entries of lands within the limits of railroad grants in cases where said entries have been made under the regulations of the land department."

[Objected to by plaintiff as incompetent and immaterial, and as the rights of plaintiff attached to the land in question long prior to the passage of said act.]

DEFENDANT RESTS.

Plaintiff offers in evidence a certified copy of map filed in General Land Office Dec. 19, 1867, by John I. Blair, President of C. R. Mo. R. R. R. Co. attached to transcript as exhibit "A, No. 8."

[Defendant objects to map as incompetent for the reason that it contains or delineates a line of the so-called Onawa branch of the C. R. & Mo. R. R. R. which has no existence—never was located, and no map thereof never filed, and is in no manner referred to in the certificate authenticating the map which the said Blair is alleged to have filed, and that said Blair never filed or offered to file any map purporting to be a map of the Council Bluffs branch of the C. R. & Mo. R. R. R., and that no law authorizes the construction or making of any grant for such branch.

PLAINTIFF RESTS.

And the testimony and all thereof offered and introduced in the trial of the above entitled cause was on the 23d day of September, 1881, was certified to by the

District Judge who tried said cause, certifying that the transcript thereof from which this abstract is taken contained all of the testimony, documentary evidence and maps offered and introduced on the trial of said cause which certificate is attached to said transcript.

And the foregoing evidence and testimony was all the testimony offered and introduced in said cause on the trial of said cause, and is hereinbefore fully set out, except the maps introduced by the respective parties, which it was impracticable to set out in the abstract, but they are referred to in the abstract and attached to transcript.

And on the 25th day of September, 1881, the following judgment was entered in said cause at the Regular September Term, 1881, of the Monona County District Court, as follows:

Be it remembered that on the 23d day of September, 1881, the above entitled cause which by consent of parties was duly and finally submitted to me on the 5th day of August, 1881, at Sioux City, Iowa, upon the pleadings theretofore therein filed, and the proof then taken and stipulations filed and the argument of counsel, the plaintiffs appearing by attorneys, Joy & Wright and E. S. Bailey and defendant, by his attorneys, John S. Monk and John E. Selleck and it being stipulated between the parties that the decree should be entered as of the September Term, 1881, of this court. And the cause having been by me fully considered it is by me found that the plaintiffs have failed to establish that the patent from the United States mentioned in the pleadings was issued to the defendant Jewell by reason of fraud or mistake, but it is found that the same was duly and legally executed and delivered to the defendant Jewell, and that the same is valid

and effectual in law and equity and that the plaintiffs herein nor either of them have any right, title or interest in the land conveyed thereby.

It is therefore considered, adjuged and decreed hereinafter a full hearing upon the merits that the plaintiffs bill be and the same is hereby dismissed.

It is also ordered that the plaintiff pay the costs of this action taxed at $——, and the execution issued therefor. To the decree and order the plaintiffs except.

C. H. LEWIS,

Judge.

And on the 22d day of Febraary, 1882, the plaintiffs duly served on defendant and the Clerk of said Court notice of appeal, and on the said day filed the same in said Court.

ASSIGNMENT OF ERROR.

Appellants say there is manifest error on the face of the record in this.

1. That the court erred in finding that the patent issued to defendant was not issued by reason of fraud or mistake, but was legally issued.

2. The Court erred in finding that plaintiffs have no title or interest in the land in controversy.

3. The Court erred in dismissing plaintiff's bill in the said cause herein set out.

And afterwards, to-wit: on the 16th day of June, 1883, the following proceedings were had and duly entered of record, to-wit:

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD CO., *et al*, Appellants, *vs* ANDERSON JEWELL.	Appeal from Monona District Court.

In this cause the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and is hereby affirmed and a writ of procedendo issued accordingly.

It is further considered by the Court that the appellants pay the cost of this appeal taxed at $ ——— and that execution issue therefore.

The opinion of the Supreme Court in said cause, announced June 16th, 1883, is in the words and figures following, to-wit:

CEDAR RAPIDS & M. R. Co. and others *v.* JEWELL.

Filed June 16, 1883.

There is a distinction between indemnity against a failure of title to specific lands or land in place, and indemnity against a failure of quantity, where a grant is made of mere quantity, and the lands are not in place. In the latter case the indemnity consists of the mere right to select secondarily from larger limits, if the quantity intended to be granted is not first found within the narrower limits; and as in this case Congress, by the grant to the Cedar Rapids & Missouri River Railroad Company, by act of June 2, 1864, could not have intended any provision of indemnity, the burden of proof is on the railroad company to show that there is not enough of the land to satisfy the grant, before it can establish its claim to the land of defendant, who has obtained a patent for a part of such land from the government.

Appeal from Monona district court.

Action in equity. The plaintiffs aver in substance that they are the equitable owners of the S. E. ¼ of S. W. ¼ of section 28, township 83 N., of range 45 W. of the fifth P. M. They aver that they became such owners under an act of congress approved June 2, 1864, whereby certain lands were granted to aid the Cedar Rapids & Missouri River Railroad Company in the construction of its road; that after they became such owners the defendant wrongfully obtained a patent to the land. They ask that it be decreed that he holds the title in trust for the plaintiffs, and that he be decreed to convey the title to them. The defendant denies that the plaintiffs have any interest in the land. The court dismissed the plaintiff's petition, and they appeal.

E. S. Bailey and *Joy & Wright*, for appellants. *John S. Monk*, for appellee.

ADAMS, J. The defendant made an application for the land, February 6, 1865, under the homestead law. The patent issued to him was issued under the supposition that he was entitled to it under such law. That he was entitled to it is not disputed, unless the Cedar Rapids & Missouri River Railroad Company had at the time of the application, February 6, 1865, acquired such interest in the land that it could not at that time properly be deemed subject to entry under the homestead law. The statute referred to as the act of June 2, 1864, is an amendatory act. That portion under which the plaintiffs claim the land in controversy is found in section 4, and is in these words: "The secretary of the interior shall reserve and cause to be certified and conveyed to said company from time to time, as the work progresses on the main line, out of the public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, * * * within 15 miles of the original main line, an amount

of land equal to that authorized to be granted to aid in the construction of said road by the act to which this is an amendment." The road referred to, as intended to be aided by the original act, is that of the Iowa Central Air-line Railroad Company. To aid in the construction of such road, congresss had made a grant of lands by an act approved May 15, 1856. By that act congress had granted "every alternate section of land designated by odd numbers for six sections in width on each side" of the road. It was foreseen, however, that it would appear upon the location of the road that a portion of the land embraced witbin the six-mile limits had been disposed of. To supply any deficiency, therefore, which might exist, congress made a provision in the same act for the appointment of an agent by the governor of Iowa to select within 15 miles of the road nearest the tiers of sections above specified so much land in alternate sections or parts of sections designated by odd numbers, as should be equal to such lands sold or otherwise appropriated, or to which pre-emption rights had attached, and it was provided that the land thus selected should be held in trust for the said Iowa Central Air Line Company. Afterwards that company located its road, but failed to construct it, and, having failed to construct it, the state of Iowa resumed the grant and conferred the lands upon the Cedar Rapids & Missouri River Railroad Company. At the same time, or soon afterward, it was discovered that there was not sufficient vacant land in the alternate sections designated by odd numbers within 15 miles, to be equivalent to six sections for each mile of road. Congress accordingly passed another act to supply the deficiency, to-wit, the act in question, approved June 2, 1864, granting to the Cedar Rapids & Missouri River Railroad Company for that purpose all the land within 15 miles. The lands thus granted outside of the six mile limits have usually

been denominated lieu lands or indemnity lands. The land in question is contained in an even numbered section, and is between the six-mile and fifteen-mile limits. It is, therefore, a part of the so-called indemnity lands. So far there is no dispute.

The counsel for the respective parties have discussed with great learning and ability the nature of the right which the railroad company acquired in the land in question by the passage of the act. We do not care to go into a consideration of this question. The company, doubtless, as against the United States, acquired, upon the construction of the road, the right to select and claim the land as a part of the intended indemnity, if the deficiency was such as to justify it. What right the company acquired previous to selection as against the defendant, a homestead settler, is a question which presents no little embarrassment, and upon which there is not, perhaps, entire harmony in the adjudication. As to this we are not at present entirely agreed. For the purpose of the opinion it may be conceded that the plaintiffs would be entitled to resort to this land if it were necessary to fill the required indemnity. But it will not be denied that if the indemnity has been filled, the interest in the land which the plaintiffs may have had prior thereto would be extinguished. As to whether it has been filled the parties differ widely. They differ, also, as to who has the burden of proof upon such question.

As to the amount of land to which the railroad company became entitled, it is sufficient for us to say that we held, in the case of the same plaintiffs against Herring, 52 Iowa, 687, [S. C. 3 N. W. Rep. 786,] that the length of road constructed was 271 6-10 miles; and it is conceded that the evidence in this case as to length of road is the same as in that case. The amount intended

to be granted to aid in the construction was six sections per mile. If we are correct as to the length of the road, the amount of the grant would be 1,629 6-10 square miles, or 1,042,944 acres. There have been certified to the company 1,144,154 acres. In addition thereto the company has selected and made claim to the balance of the indemnity lands, including the land in question, being about 41,000 acres more. The plaintiffs contend, however, that they are still short. They contend that from the lands certified there must be deducted 194,276 acres, on account of a failure of title. If they are correct in regard to the amount that should be deducted, it will be seen that there would be, as claimed, a deficiency.

We have to say, however, that we think that the deduction claimed is too large by at least the amount of 76,800 acres, and that the deficiency, if any, in the lands certified, to be made up from the lands uncertified, does not, in any event, much exceed 17,000 acres. If we are correct in this, then the 41,000 acres selected and claimed is more than the plaintiffs are entitled to by nearly 24,000 acres.

In respect to the claimed deductions we shall examine but one item, and that is the item of 120 sections, or 76,800 acres, which it is said went to the original company, the Iowa Central Air-Line Railroad Company. In the examination of this item we shall not stop to inquire whether any part of that land inured to the benefit of the plaintiffs, as the defendant claims, because, in the view which we have taken in the case, such inquiry is not material. The question, we think, must turn upon the construction which should be given to the act of congress under which the plaintiffs claim. These lands were originally granted to the Air-Line Company; and the defendant's position is that, this being so, they must be taken to be a part of the grant of six sections per mile made to the Cedar Rapids and

Missouri River Railroad Company, and that this appears from the language used in the grant. The defendant's position, it appears to us, is sound. The provision in the act is that "the Cedar Rapids & Missouri River Railroad Company shall be entitled * * * to the same lands, and the same amount of lands per mile, * * * as originally granted." The location of a part of the road by the Air-line Company had rendered the 120 sections in question specific. In making a grant of specific lands, or lands in place, it must, of course, have been assumed that it had the right to make such grant, and that the title passed. In the face of this assumption, it appears to us that we cannot say that congress had in mind to provide indemnity against a failure of title.

There is a sharp distinction to be made between indemnity against a failure of title to specific lands or lands in place, and indemnity against a failure of quantity, where a grant is made of mere quantity and the lands are not in place. The indemnity in the latter case consists of the mere right to select secondarily from larger limits, if the quantity intended to be granted is not first found in the narrower limits. We know that this kind of indemnity was intended; we have no reason to think that the other was. It appears to us certain that congress assumed that the grant of lands in place, together with the grant by quantity within the six mile limits, with indemnity for deficiency of quantity, would make six sections per mile, and did not provide for any further contingency. It is true, we must assume that congress supposed that the company needed to be aided to the extent of six sections per mile. But we do not regard this assumption as of much importance. It would not justify us in so construing the act as to provide for a contingency which congress manifestly did not contemplate. A part of its grant proves to be insufficient. No one would claim that congress under-

stood that it was doing an ineffectual thing, and in the same act provide indemnity therefor.

If, then, congress did not have in mind any provision of indemnity for these lands, we cannot hold that any was made. Under this view, the 120 sections cannot properly be deducted from the amount certified, and the deficiency to be made up out of other lands does not much exceed 17,000 acres. To supply this deficiency would not, so far as the evidence shows, exhaust the indemnity lands; and the question is whether the plaintiffs can, under the evidence, be allowed to resort to the defendant's land. This action is in equity, and the plaintiffs can be allowed to resort to the defendant's lands only in case they have shown a superior equity.

The defendant, though a homestead settler, sustains the same relation to the land that he would if he derived title from the same source as an ordinary purchaser. He holds a patent, and under it he has occupied the land for many years, making valuable and somewhat expensive improvements year by year. Prior to the making of most of these improvements there were certified to the railroad company land enough to fill the required indemnity, and more than 100,000 acres besides. Under the act in question it was made the duty of the secretary of the interior to reserve and certify to the company the land necessary to fill the indemnity. Now, while it may be that the land formally reserved and certified may, by reason of the failure of title to part thereof, be insufficient, and a resort to other indemnity land necessary, it appears to us that, under the circumstances, if there is enough of such other land, of which the United States has never made any disposition, to supply the deficiency, that should be deemed reserved, and that the burden is upon the plaintiffs to show that there is not enough of such land. This was held, in substance, in *Railroad Co* v *Herring*, above cited, and we see no reason to depart from the ruling. It is not

shown that the indemnity cannot be filled without resorting to the defendant's land. Whether, if it could not be filled without resorting to the defendant's land, we should be justified, in view of the circumstances above set forth, in holding for the plaintiffs, we do not determine. It is not necessary to determine that question.

For the reasons assigned, we think that the judgment must be affirmed.

And on the 10th day of August, 1883, there was filed in the office of the clerk of said court, a petition for a writ of error, and the same, together with the endorsement thereon allowing said writ are in the words and figures following, to-wit:

SUPREME COURT OF THE STATE OF IOWA.

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD COMPANY, *et al*,
vs.
ANDERSON JEWELL.

To the Chief Justice of the Supreme Court of Iowa:

The petition of the above named plaintiff, the Ceddar Rapids & Missouri River Railroad Company and the Iowa Railroad Land Company respectfully shows that a final decree or judgment in the above entitled suit was rendered at the June term, A. D. 1883, by the Supreme Court of the State of Iowa—being the highest court of said state in which a decision in said suit could be had against the said plaintiffs and in favor of said defendant, Anderson Jewell, affirming the judgment or decree of the district court dismissing the petition or suit of said plaintiffs on the merits thereof: that there was therein drawn in question the right and title of said plaintiffs to certain lands specially set up and claimed by them under a statute of the United States entitled "An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of railroads in said state," approved May 15, 1856, and an act

amendatory thereof, approved June 2, 1864, and that said judgment and decision was against the said right and title so specifically set up and claimed by said plaintiffs under the said statutes.

And your petitioners claim that there was manifest error in the said judgment and decision to the injury of said petitioners and they therefore pray your honor will examine the record in said suit and allow a writ of error therein from the Supreme Court of the United States to the Supreme Court of Iowa, pursuant to the statute in such cases made and provided.

CEDAR RAPIDS & MISSOURI RIVER RAILROAD COMPANY,
IOWA RAILROAD LAND COMPANY,

Petitioners.

By E. S. BAILEY, their Attorney.

Endorsed:

"The writ of error as herein prayed is allowed, this first day of August, 1883.

JAMES G. DAY,
Chief Justice of Supreme Court of Iowa."

And on the same day there was filed in the office of Clerk of said court a supersedeas bond, where the original is now lodged, said bond with an endorsement of approval therein being in the words and figures following, to-wit:

"THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD COMPANY, and THE IOWA RAILROAD LAND COMPANY.

v.

ANDERSON JEWELL.

Know all men by these presents that we, the Cedar Rapids & Missouri River Railroad Company and the Iowa Railroad Land Company as principals, and Charles H. Toll and George B. Young of Clinton County, Iowa, as sureties, are held and firmly bound unto Anderson Jewell in the sum of five hundred dollars, to be paid to said Jewell, his executors and administrators; to which payment, well and truly to be made, we bind ourselves

and each of us jointly and severally and each of our successors and assigns, executors and administrators firmly by these presents, sealed with our seals and dated this 28th day of July, A. D. 1883.

Whereas, the above named Cedar Rapids & Missouri River Railroad Company and the Iowa Railroad Land Company have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of Iowa, now, therefore, the condition of this obligation is such that if the above named Cedar Rapids & Missouri River Railroad Company and the Iowa Railroad Land Company shall prosecute this writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

CEDAR RAPIDS & MISSOURI RIVER
RAILROAD COMPANY, (Seal.)
By E. S. BAILEY, Attorney.
IOWA RAILROAD LAND COMPANY, (Seal.)
By E. S. BAILEY, Attorney.
CHARLES H. TOLL, (Seal.)
GEO. B. YOUNG, (Seal.)

STATE OF IOWA, }
CLINTON COUNTY, } ss.

We, Charles H. Toll and Geo. B. Young, being duly sworn, each for himself says that he is a resident of the state and is worth more than one thousand dollars beyond the amount of his debts, and that he has property in the state liable to execution to the amount of one thousand dollars.

GEO. B. YOUNG,
CHAS. H. TOLL.

Subscribed in my presence and sworn to before me the undersigned, a Notary Public in and for Clinton County, Iowa, by the above named Chas. H. Toll and Geo. B. Young each for himself.

In witness whereof I have hereunto set my hand and Notarial Seal this 28th day of July, A. D. 1883.

{ NOTARIAL SEAL. }

HALLECK W. SEAMAN,
Notary Public.

Endorsed:

"Approved by me this 1st day of August, 1883.

JAMES G. DAY,
Chief Justice Supreme Court of Iowa.

The writ of error and citation are herewith transmitted in original form, copies thereof being retained in the office of the clerk of said Supreme Court of Iowa.

THE UNITED STATES OF AMERICA—SS.

The President of the United States of America, to the to the Honorable Judges of the Supreme Court of Iowa, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court before you, being the highest court of law or equity of said state in which a decision could be in the said suit between the Cedar Rapids & Missouri River Railroad Company and the Iowa Railroad Land Company, plaintiffs in error, and Anderson Jewell, defendant in error, wherein was drawn in question the right and title of said plaintiffs to certain lands specially set up and claimed by them under a statute of the United States, entitled "An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of railroads in said state," approved May 15, 1856, and an act amendatory thereof approved June 2, 1864, and the judgment and decision were against the right and title so

specially set up and claimed by said plaintiffs under said statute a manifest error hath happened to the great damage of the said Cedar Rapids & Missouri River Railroad Company and the Iowa Railroad Land Company, plaintiffs in error as by their complaint appears;

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Hon. MORRISON R. WAITE, Chief Justice of the Supreme Court of the United States the seventh day of August, A. D. 1883.

{ Seal C. C. U. S. N. dist. of Iowa. }

A. J. VAN DUZEE,
Clerk U. S. C. C., N. Dist. of Iowa.
By ALFRED HOBBS,
Deputy.

UNITED STATES OF AMERICA,

To ANDERSON JEWELL, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the state of Iowa, wherein the Cedar Rapids & Missouri River Railroad Company and the Iowa Railroad Land Company are plaintiffs in error and Anderson Jewell is defendant in error to show cause, if any there be, why the judgment in

said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. JAMES G. DAY, Chief Justice of the Supreme Court of Iowa, this first day of August, 1883.

JAMES G. DAY,
Chief Justice of the Supreme Court of Iowa.

"Due service of the within citation is hereby accepted the 10th day of August, 1883.

JOHN S. MONK,
Attorney for Defendant.

And agree to enter appearance for the heirs of said Jewell.

THE STATE OF IOWA—SS.

I, G. B. Pray, clerk of the Supreme Court of Iowa, do hereby certify that the foregoing is a true and correct abstract of the record in said cause, to-wit, the appellants' abstract, judgment, opinion of the Supreme Court, petition for a writ of error, and bond, and the original citation and writ of error are hereto attached and this transcript is returned in obedience to said writ of error.

And I further certify that the map transmitted herewith was considered in connection with appellants' said abstract, and the same is returned herewith, detached from the transcript because the same can not conveniently be attached thereto.

Witness G. B. Pray, Clerk of said Court, with the seal thereof, this October 4th, 1883.

{ Seal Supreme } { Court of Iowa. }

G. B. PRAY,
Clerk Supreme Court of Iowa.

110-27

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

OFFICE SUPREME COURT U.S.
FILED
NOV 19 1883
JAMES H. MCKENNEY, CLERK.

No. 142.

THE CEDAR RAPIDS AND MISSOURI RIVER RAILROAD COMPANY AND THE IOWA RAILROAD LAND COMPANY, PLAINTIFFS IN ERROR, vs. BENJAMIN HERRING.

No. 143.

SAME, PL'FFS IN ERROR, vs. JOHN T. LAKE.

No. 144.

SAME, PL'FFS IN ERROR, vs. LEWIS IDDINGS.

No. 145.

SAME, PL'FFS IN ERROR, vs. DANIEL T. CUTLER.

No. 146.

SAME, PL'FFS IN ERROR, vs. PATRICK DUNDON.

No. 147.

SAME, PL'FFS IN ERROR, vs. ELIJAH W. BROOKS.

No. 148.

SAME, PL'FFS IN ERROR, vs. DAVID GREENSTREET.

No. 149.

SAME, PL'FFS IN ERROR, vs. CATHERINE M. WOOSTER.

No. 150.

SAME, PL'FFS IN ERROR, vs. WILLIAM T. BOYD.

ARGUMENT OF PLAINTIFFS IN ERROR.

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No. 150.

SAME, PL'FFS IN ERROR, vs. WILLIAM T. BOYD.

ARGUMENT OF PLAINTIFFS, IN ERROR.

STATEMENT OF CASE.

These cases were brought into this court on writs of error to the Supreme Court of Iowa, where they were heard, submitted and decided upon the same record. They are actions in equity to quiet title to the different tracts of land in the plaintiffs. Their claim to the land is based upon the Act of Congress approved May 15, 1856, known as the Iowa Railroad Land Grant Act, and the amendment thereto, passed June 2, 1864. The defendants claim to hold the land under patents from the United States, issued at different dates between May, 1870, and April, 1874, and under homestead and private entries made between March, 1865, and January, 1868

The Act of Congress of May 15, 1856, (Record, p. 13) granted lands to the state of Iowa for the purpose of aiding in the construction of certain railroads, the one under consideration being described as running from Lyons City northwesterly to Maquoketa, and thence as near as practicable to the 42° parallel across the state to the Missouri River, and known as the Iowa Central Air Line Railroad. The grant embraced "every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads," and further, in case it should appear when the line of road should be definitely fixed, that the United States had disposed of any of the lands so granted, then it should be lawful for any agent appointed by the Governor of of Iowa to select, subject to the approval of the Secretary of the Interior, other lands in alternate sections designated by odd numbers and within 15 miles of the line of said railroad an amount of land equal to those disposed of by the United States.

On the 14th day of July, 1856, by an act of the General Assembly, (p. 14), the State of Iowa accepted the grant, and in the same act granted the land appropriated to the line heretofore described, to the Iowa Central Air Line Railroad Company.

During the years 1856 and 1857, (p. 26. Map filed June, 1857), the said company made a survey and located the line of its road from Lyons City to a point on the Missouri River in Monona County, and thereupon the limits of the grant were definitely fixed.

In pursuance of the Act of Congress the Governor of Iowa appointed Bernhart Henn an agent to select other lands between the the 6 and 15 mile limits, in lieu of those disposed of within the six mile limits, and on the 4th day of September, 1856, (p. 26), he selected all the vacant and unappropriated land in the odd sections between the six and fifteen mile limits to make up the deficiency, which, together with the lands within the six mile limits, were insufficient to make a full grant of six sections per mile.

The Secretary of the Interior on the 27th day of December, 1858, approved said selection and certified to the State said lands so selected within the six and fifteen mile limits, and afterwards, on the 26th of October, 1859, certified other lists within the 15 mile limits. (30)

On the 17th day of March, 1860, the State resumed the grant conferred upon the Iowa Central Air Line Railroad Company, (p. 17), and on the 26th of March, 1860, (p. 19), conferred the rights and lands so resumed upon the Cedar Rapids & Missouri River Railroad Company—one of the plaintiffs—and the same were accepted by the Company.

The Act of Congress approved June 2, 1864, amending the Act of May 15, 1856 (page 22-3) Sec. 4, authorized the Cedar Rapids & Mo. River R. R. Co. to modify or change the location of the uncompleted portion of its line so as to secure a better and more expeditious line to the Missouri River, and to a connection with the Iowa Branch of the Union Pacific Railroad, and it further declared that said Railroad Company "shall be entitled, for such modified line, to the same lands and to the same amount of lands per mile * * * as originally granted to aid in the construction of its main line subject to the conditions and forfeitures mentioned in the original act" and also the right of way through public lands. "And it is further provided that whenever said modified line shall have been established * * * the said Railroad Company shall file in the general land office of the U. S. a map definitely showing such modified line * * * and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said Company from time to time as the work progresses on the main line, out of any public lands now belonging to the United States not sold, reserved, &c , within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this an amendment. And if the amount of land per mile granted, or intended to be granted, by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line * * * within twenty miles thereof."

The modified line of the railroad was located to a point near Missouri Valley prior to June 19, 1865, and to

the western terminus of the road on the Missouri River opposite Omaha during the year 1866. The line was modified and located under the act of June 2, 1864, for the purpose of forming a connection with the Iowa branch of the Union Pacific Railroad (p. 72.)

A map of the general route of the modified line located prior to June 19, 1865, was filed in the department of the interior July 11, 1865 (p. 38–72), and the map of the remainder of the line December 19, 1867.

The railroad was completed to its western terminus on the Missouri River, opposite Omaha, about the first of July, 1867, a distance from Cedar Rapids of 271 6-10 miles, and from Clinton a distance of 353 6-10 miles (p. 37-49-72.)

The Lyons plug (so called) which the company was required to build by the act of the Legislature of Iowa of March 26, 186), and the act of Congress of June 2, 1864, was completed in 1868; its length is 2 41-100 miles (p. 38.)

The length of the Iowa Central Air Line is 344 41-100 miles.

Soon after the passage of the act of June 2, 1864, the company, through its agents, claimed as enuring to the road under the grants, at the land department, all the vacant lands within the 15 mile limits of the Air Line Railroad, and within the 20 mile limits of the modified line (72)

On the 16th day of June, 1864, the Secretary of the Interior withdrew from sale, location, homestead entry or pre-emption claim all the public lands in the State, with a view to facilitate the adjustment of the railroad grants, (p. 30), and on the 25th day of June, 1864, ruled

that the Act of June 2, 1864, operated upon all the public lands belonging to the United States at the date of the Act, and lying within the prescribed limits of the several roads, saving rights of prior inception; and consequently not only took hold of the odd but the even numbered sections also. (p. 31-107). After the Land Department had given this decision and construction to the Act of June 2, 1864, holding that the rights of the railroad companies were protected under the Act, on the 24th day of August, 1864, the order of withdrawal, which applied to all the public lands in the State, was modified so as to allow homestead and pre-emption entries to be made. (p. 46-108). This modification was erroneously construed by the local officers to authorize the allowance of homestead and pre-emption entries upon the lands within the railroad grant of June 2, 1864. (p. 44).

In May, 1865, the officers and agents of the Railroad Company, having learned that a number of pre-emption and homestead entries of claims had been attempted to be made upon the lands embraced in the limits of the grant, notified the Secretary and Commissioner thereof and requested that instructions be issued forbidding the allowance of such entries by the local land officers, and also that the entries already made be suspended. (31-112.)

On the 30th day of May, 1865, the Land Department acceded to this request (32-112), and on the 7th day of June, 1865, the Commissioner of the Land Office issued an order to the local officers prohibiting them from allowing any entries of any character upon the even numbered sections within the fifteen mile limits or on the odd or even sections in the additional 5 or 20 mile

limits of the road, and also suspending all entries made subsequent to June 2, 1864. (34-113.)

On the 23d day of August, 1866, the Commissioner reiterated his instructions to the local officers, stating again that the even numbered sections within the 5, 15, and 20 mile limits of the Company's railroad were not subject to homestead or pre-emption entries, (35-117), and the ruling was again repeated September 20, 1866. (35.)

But notwithstanding the decision and ruling of the Land Department, heretofore refered to, and the instructions of the Commissioner, the local land officers disregarded the rights of the Railroad Company and wrongfully allowed pre-emption and homestead entries after June 2, 1864, to be made upon the lands within the limits of the grant, upon which patents were wrongfully issued during and after the year 1870. The officers of the Railroad Company had no knowledge of the entries upon the lands, or their occupancy until after the patents had been issued therefor.

The defendant, Benjamin Herring, claims title to the east half of the northeast quarter of section 20, township 84 north, of range 46, west 5th P. M., under a patent dated April 1, 1872, issued under a homestead application made May 31, 1865.

The defendant, Catherine M. Wooster, claims title to the east half of the southwest quarter, section 12, township 85, range 43, under a patent dated May 16, 1870 issued under a cash entry made October 5, 1869.

The defendant Daniel T. Cutler claims title to the south half of the northwest quarter of section 10, township 84, range 46, under a patent dated January 15, 1873, issued under homestead entry made August 13, 1866.

The defendant John T. Lake claims title to the north half of the southeast quarter of section 4, township 85, range 42, under a patent dated April 10, 1874, issued under homestead entry made August 18, 1866.

The defendant Patrick Dundon claims title to the southwest quarter of southwest quarter of section 6, township 84, range 45, under a patent dated April 10, 1874, issued under homestead entry made August 24, 1866.

The defendant, Lewis Iddings claims title to the north half of the northeast quarter, section 6, township 85, range 42, under a patent dated January 15, 1873, issued under homestead entry made June 12, 1865.

The defendant Elijah W. Brooks claims title to the west half of the northeast quarter, section 20, township 84, range 46, under a patent dated July 7, 1871, issued under homestead entry made May 31, 1865.

The defendant Wm. T. Boyd claims title to the north half of the northwest quarter, section 28, township 84, range 46, under a patent dated January 15, 1873, issued under a homestead entry made June 4, 1868.

The defendant David Greenstreet claims title to the southwest quarter of northeast quarter and southeast quarter of northwest quarter of section 24, township 85, range 44, under a patent dated January 16, 1875, issued under private entry made March 20, 1865.

All the said lands are upon even numbered sections within the fifteen mile limits of the original main line of the Iowa Central Air Line Railroad, and passed to the Cedar Rapids & Missouri River Railroad under the grant of June 2, 1864. The said Cedar Rapids & Missouri River Railroad has not received the amount of

land to which it is entitled under the grants of 1856 and 1864.

The Iowa Railroad Land Company has an equitable interest in said lands, under a contract made with the Cedar Rapids & Missouri River Railroad, and is joined as plaintiff herein. These suits were brought to recover the lands wrongfully entered by and patented to the defendants respectively.

The same questions of law and fact are involved in all the foregoing suits, and by stipulation were submitted together in the District and Supreme Courts of Iowa upon the pleadings and testimony embraced in the record.

The cases were tried in the Monona District Court on written evidence, embraced in the record, and on the 13th day of June, 1878 the court entered decrees dismissing plaintiffs bills. They were duly appealed to the Supreme Court of Iowa, and at the December term thereof. A. D. 1879, a judgment or decree was entered affirming the decrees of the court below, and dismissing the plaintiffs bills. Thereupon the plaintiffs sued out writs of error and brought the same to this Court for review. The opinion of the Supreme Court of Iowa is found on page 126 of the printed record.

It will be seen, by reference to the opinion, that relief was denied the plaintiffs not on the ground that the act of June 2, 1864, did not operate upon and take hold of the even numbered sections within the 15 mile limits of the original main line, but the Court held that the plaintiffs were entitled to six sections of land per mile of the constructed road of the main or modified line only, being 271 6-10 miles—from Cedar Rapids to Council Bluffs—and were not entitled to lands for the

Lyons branch, or "Lyons Plug," so called, 2 41-100 miles long; nor for the Onawa branch, about six miles long. Upon that basis the Court concluded that the plaintiffs had already received all the lands they were entitled to except about 5,000 acres; but inasmuch as they had selected more lands than this deficiency it devolved on them to show that the lands selected had been disallowed, abandoned, or the claim thereto released before other lands could be selected in lieu thereof. And the Court further held that if the grant could be filled from the odd numbered sections the plaintiffs would not be entitled to any lands in the even numbered sections, and that there was no evidence showing that the odd numbered sections within the grant had been exhausted.

Assignment of Errors.

The plaintiffs in error say that in the record and proceedings in said causes there is manifest error in this to-wit:

1. The Supreme Court of Iowa erred in its construction of the Act of Congress approved May 15, 1856, entitled "An act making a grant of lands to the State of Iowa," &c., and the act amendatory thereof, approved June 2, 1864, and particularly the fourth section of the same, whereby said Court held and decided that said plaintiffs were entitled under said grants to only six sections of land per mile of railroad actually constructed. Whereas, said Court ought to have held and decided that under said acts of Congress the plaintiffs were entitled for constructing said modified

line to the same amount of land as was originally authorized to be granted to aid in the construction of the entire main line of the Iowa Central Air Line Railroad.

2. The Court erred in holding that plaintiffs were not entitled to any lands for constructing the branch railroad between Clinton and Lyons.

3. The Court erred in holding that plaintiffs were not entitled to any land for constructing the Onawa Branch Railroad—so-called.

4. The Court erred in holding that it devolved on the plaintiffs to show that the lands selected had been disallowed, abandoned or released from the claim made thereto before they would be entitled to recover the lands in suit.

5, The Court erred in so construing the said grants as to hold that the plaintiffs' proofs that the odd numbered sections had been exhausted, were insufficient.

6. The Court erred in holding that plaintiffs are not entitled to the lands in suit, while conceding that they have not received all the land they are entitled to under the grant.

7. The Court erred in affirming the judgments of the Court below, dismissing the petitions of plaintiff and holding that they had no title or interest in the lands in controversy.

ARGUMENT.

I.

The first material question arising in these cases is upon the construction to be given to the Act of May 15, 1856, and the amendatory Act of June 2, 1864,

with reference to the quantity of lands to which the plaintiffs are entitled. The Supreme Court of Iowa held that the plaintiffs were only entitled to receive six sections of land per mile of *constructed* road instead of six sections per mile of the entire route or line of road as located by the Iowa Central Air Line Railroad Company—the original grantee. The plaintiffs claim that the latter is the true construction of the grant and that they are entitled to as many lands—the same quantity—as the Iowa Central Air Line Company would have been entitled to receive had it constructed the entire road. Under the first assignment of errors the plaintiffs propose to discuss that question.

Under the Act of May 15, 1856, it is clear that Congress intended to grant, in aid of the construction of the road upon the Iowa Central Air Line survey, six sections per mile for the 344 9-10 miles, the length of that line. (See section 1 of that Act, page 13.)

By the Act of the General Assembly of the State of Iowa, approved July 14, 1856, (15) the State conferred upon the Iowa Central Air Line Railroad Company all the lands granted by the Act of Congress for the construction of the road from Lyons City to the Missouri River. This Company having constructed no part of the road, the State by the Act of March 17, 1860, resumed all the lands embraced in the grant, except the first 120 sections which passed to that Company by the terms of the granting acts, (p. 17), and on the 26th day of March, 1860, conferred the same upon the Cedar Rapids & Missouai River Railroad Company, one of the plaintiffs herein. (p. 19). At this time there had been a road constructed from Clinton 2 41-100 miles from Lyons City westwardly to Cedar Rapids, a point on the

line of Air Line survey. The Cedar Rapids & Missouri River Railroad Company was formed for the purpose of extending that road to the Missouri River as near as practicable to the 42° parallel. If the road was so extended then there would be a continuous line from Clinton on the Mississippi River to the Missouri River, and all the benefits to the State contemplated by the Act of 1856 would be fully secured. In 1864 it had become of national importance that there should be a railroad constructed across the State to connect with the Iowa branch of the Union Pacific Railroad,, and, of the Iowa Land Grant railroads, that built by the plaintiffs was then the nearest and capable of the earliest extension to the Missouri River. All the lands enuring to the grant had then been certified to the State, and it was known that there was a large deficiency. (p. 30-40).

For the purpose of securing the early completion of the road the act of June 2, 1864 was passed (p. 22-3) and by it Congress intended (1) to confirm the grant of the State to the company made March 26, 1860, and (2) to increase the lands so granted to an amount equal to that originally intended to be granted under the act of 1856.

By the act of the General Assembly (p. 20, sec. 6) it was contemplated that the Chicago, Iowa & Nebraska Railroad should form a part of the continuous line of railroad across the State in connection with the plaintiffs line, and the plaintiffs were authorized to commence the building of its road at or near Cedar Rapids, the western terminus of the Chicago, Iowa & Nebraska Railroad. For the line from Cedar Rapids to the Missouri River the legislature conferred upon the plaintiffs

all the lands embraced in the grant of 1856. The act of June 2, 1864, recognized and confirmed this grant.

By section 4 it was provided that the C. R. & M. R. R. R. Co., to which the State had granted a portion of the lands mentioned in the act of 1856, might change the location of its line so as to secure a better and more expeditious line to the Missouri River and to a connection with the Iowa branch of the Union Pacific Railroad, and it should be entitled to the same lands and to the same amount of lands per mile as originally granted to aid in the construction of the main line, and the Secretary of the Interior was directed to reserve and cause to be certified and conveyed to the company, "out of any public lands within 15 miles of the original main line an amount of land equal to that originally authorized to be granted to aid in the construction of the said main line; and if the amount of land per mile granted or *intended to be granted* by the original act should not be found within the limits of fifteen miles," then selections should be made within 20 miles of the modified line.

By the terms of the grant from the State, which is here recognized and confirmed, the entire body of lands embraced in the act of 1856 was conferred upon the company. This grant the act of 1864 makes a full grant of six sections per mile for the entire length of the Air Line Survey, provided the lands can be found within the limits prescribed by the act.

All the odd numbered sections found along the entire length of the Air Line Survey from the Mississippi to the Missouri River passed under the grant from the State to the Railroad Company, and when the deficien-

cies in that grant are made up the full grant enures to the benefit of the company.

The act of 1864 in substance says to the Cedar Rapids & Missouri River R. R. Co,, modify your main line so as to secure a better and more expeditious line to a connection with the Iowa branch of the Union Pacific and you shall have the grant conferred by the State, and in addition thereto enough to make the grant of 1856 a full grant, not for the constructed line, but by the express the express terms of the act, for the *original main line*. Had it been the intention of Congress to have made the grant for the construction of the modified line a full grant of six sections per mile for the road actually built, the act of 1864 would have so provided, instead of making the grant of 1856 a full grant.

Had there been six sections per mile for the entire length of the Air Line Survey at the date of the act of the Legislature of March 26, 1860, within the limits of the grant as fixed by the act of 1856, there can be no doubt but that the entire grant would have passed to the company for the construction of the modified line, irrespective of the length of the constructed line.

The act of 1864 filled up the grant of 1856, and when so filled up the entire grant passed to the company for the building of the modified line. No distinction is made between the lands which were in fact found within the limits of the grant of 1856 and those *intended to be granted* by that act, and from the terms of the act of 1864 it is the lands intended to be granted by the act of 1856, as well as those actually granted, that passed to the company under the act.

In 1856 Congress was willing to grant, and did in terms, grant six sections per mile to aid in constructing

the line across the State from Lyons City to the Missouri river as near as practicable to the 42d parallel. That line, upon being definitely fixed and located, was ascertained to be 344 9-10 miles long. The amount of land granted, or "intended to be granted," or "authorized to be granted," then was six sections per mile for 344 9-10 miles, or 2,069 sections—1,324,416 acres. That was the extent and limit of the grant. The company constructing the road would have been, in law, entitled to receive that quantity. But as a matter of fact there was a large deficiency. Up to 1864 there had been certified to the State 775,718 acres (p. 40), which included 109,756 acres lost to the grant by the decision of this Court in the Des Moines Improvement grant (*Wolcott vs. Des Moines Co., 5 Wallace, 681*), leaving 665,962 acres available under the Air Line Company grant. About 8,000 acres were subsequently certified under this grant, but there was still a deficiency of over 650,000 acres. The State had been unable, with this grant at its disposal, to secure the road. The Air Line Company held the grant for three years, and failed without building a mile. The Chicago, Iowa & Nebraska Company, commencing about 2½ miles from the initial point, Lyons City, had built 80 miles on a line near to the designated and surveyed route of the Air Line Company, and the plaintiffs were engaged in building an extension of the same across the State.

For the purpose of facilitating the more immediate construction of this line and to secure a better and more expeditious line to the Missouri River and to a connection with the Union Pacific Railroad then in process of building, the amendatory Act of 1864 was passed, granting to this line an equal amount theretofore

granted to aid the Air Line road. When the object to be attained is considered, namely: facilitating an early connection with the Union Pacific and at the same time securing a better and more expeditious line to the Missouri River, it is neither unnatural nor inconsistent with its policy for Congress to donate as great an amount of land for this purpose as it donated in 1856 to aid in building a less desirable and less expeditious line across the State to the Missouri River.

That this was the intention of Congress is very clear and the language employed in the Act fully supports the claim.

The granting clause in the fourth section, "*the same land and the same amount of land* per mile as originally granted to aid in the construction of its main line," is descriptive of the land granted and intended to be granted by the Act of 1856, all of which are granted to aid in the construction of the substituted line. The new or more expeditious line was simply to take the place of the old, in all respects, so far as the land grant was concerned. Not only was the plaintiff to have the same lands that actually passed under the original Act, but it was to have as many lands as were granted per mile to aid in the construction of the original line, to-wit: six sections per mile of its main line. This clause evidently refers to the total quantity of land originally granted or intended to be granted. The whole phrase is descriptive of the quantity or amount of the first grant—its meaning being not to enlarge or limit that quantity, but to re-grant it. The expression is an appropriate one for defining the original grant—not merely the number of acres found applicable to it, but the entire body of lands contemplated by it.

If the grant had been "*of the same lands,*" that might have been held to pass only the identical lands actually received under the Act of 1856. But when the further clause, "*the same amount of lands per mile as are granted by said Act,*" is used, the grant conveys not only the lands actually received but enough to make up the same number of sections per mile for the entire length of the Air Line road.

That this is the true construction of the words used is confirmed by the fact that unless they were so used there is nothing in the granting clause which grants any other lands than those actually received under the grant of 1856, which had been transferred to the Company by the Act of the General Assembly of March 26, 1860.

This view is rendered the more explicit and certain by reference to the next sentence of the Act. The Secretary of the Interior is directed to "reserve and cause to to be certified and conveyed to said Company within 15 miles of the original main line, *an amount of land equal to that originally authorized to be granted to aid in the construction of the said road* by the Act of 1856."

The words "the said road" cannot, without doing violence to all the rules of construction, refer to any other road or line than that named in the same sentence and the line of the text immediately preceding, viz: "the original main line." Here is a definite and unambiguous description of the amount of land to be certified and conveyed to the Company. It is not open to construction nor is it susceptible of but one meaning. No variety of expression can make it plainer. It is an amount of land *equal* to that originally authorized to be

granted. To ascertain then how much land the Secretary was required to certify to the Company, it is only necessary to inquire how much was originally authorized to be granted by the Act of 1856 to aid in the construction of the road therein provided for. This could not be determined by measuring the length of the new or modified line, nor could it be determined in any other way than by taking the length of the original main line and allowing six sections to the mile thereof. The files and maps of the Interior Department then showed the length of the line to be 344 9-10 miles and hence the amount of land contemplated was six sections per mile for that number of miles, or 2,069 sections. If that quantity of land had been found within the original limits of the grant of 1856, the whole quantity would have been certified and passed to the State under that Act. Can it be doubted, if such had been the case, that this Company would have been entitled to the whole amount? And yet this clause of the Act requires the Secretary to certify to the Company "an amount of land equal to" that.

If there is any ambiguity or uncertainty as to the quantity of land contemplated in the phrase "same lands and same amount of lands per mile as originally granted to aid in the construction of the main line," it seems to us that it is entirely removed by the clause under consideration.

The same idea is again expressed in the next sentence of the Act, viz: "If the amount of land per mile granted or intended to be granted by the original Act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein pre-

scribed, then such selections may be made along said modified line within 20 miles thereof."

The quantity of land here specified is the amount per mile of the original line, intended to be granted by the original Act.

The difficulty urged that would arise in distributing the land under the grant if it is held that more than six sections per mile enured to the Company for the road built is answered by the provision of section 4 of the Act of March 26, 1860, which was ratified and kept in force by section 7 of Act of 1864. The method of distribution there provided clearly contemplated that after the first 60 miles west from Cedar Rapids had been constructed six sections per mile might not be the amount to which the Company would be entitled and it provides for distributing the lands, be the quantity more or less than six sections per mile.

If this construction of the Act is the true one, then the amount of land to which this Company is entitled—being the amount equal to that originally authorized to be granted—is 1,324,416 acres.

According to the Burdette letter (p. 41-2), it had received Jan. 19, 1876, under the

Act of 1856, - - - - - -		782,280 acres.
And under the Act of 1864, - - - -		349,683 "
Making a total of, - - - - -		1,131,963 "
From which should be deducted of land lost to the grant under the Des Moines River improvement decision, - - - - -	109,756	
And also land erroneously certified - - - - -	800	
		110,556
		1,021,407

Deducting this quantity from the quantity to which the Company is entitled, viz: 1,324,416—1,021,407, and there is left as still due, - - - 303,009 acres. Or according to the testimony of Mr. VanDeventer, taken September, 1877, (p. 49), which includes later certifications, there had been certified up to that date

under the Act of 1856,	-	784,056
Under Act of 1864,	- -	359,097
Making a total of	- -	1,143,153 acres certified.
Deducting the	- 109,756	
And mistaken certification	1,000	110,756
Leaves, which the Co. has rec'd,		1,032,397

Taking this amount from the total to which the Company is entitled (1,324,416—1,032,397) there is still a deficiency of 292,019 acres.

In both of these calculations there should be added to the deficiency found the 120 sections—76,800 acres which this Court in *C. R. & M. R. R. Co. vs. Courtright. 21, Wallace, 310*, held passed under the Act of the General Assembly of March 26, 1860, absolutely to the Iowa Central Air Line Railroad Company.

From the terms of the Act of June 2, 1864 it is apparent that Congress sought to hasten the construction of the road; for this purpose the additional rights and privileges confered by the act were granted. As Congress then viewed it, so great had become the public necessity for the early completion of this road to a connection with the Iowa branch of the Union Pacific, that the railroad company was authorized to change the location of its line so as to secure a better and more expeditious route to a connection with said Union Pacific Road, even if in so doing the road was built far remote

from the land grant of 1856, as fixed by the location of the Air Line Road in 1857.

It must have been apparent that this more expeditious line would be shorter than the Air Line Road and be built remote from the located land grant of 1856. Unless the Act of 1864 changed the rights of the Company under the act of 1856 and the subsequent State legislation, two things would happen if this more expeditous route was selected: by the shortening of the line less lands would be received, and by building the road remote from the land grant of 1856, the value of the lands received would be greatly depreciated. Such could not have been the inducement Congress intended to hold out to the Company in making the grant. Such construction would defeat the very object sought to be attained. Hence as if to guard against any misconstruction of the grant, the Act in express terms provides in the fourth section thereof that "the Secretary "of the Interior shall reserve and cause to be certified "and conveyed to said Company from time to time as "the work progresses on the main line, within fifteen "miles of the original main line, an amount of land "equal to that originally authorized to be granted to "aid in the construction of said road by the Act to "which this is an amendment." In other words Congress in said Act says to the Company, not that you must change the line of your road—that it could not lawfully say for the Company had vested rights under the Act of 1856—but, if you will change it so as to run upon the best and most expeditious route to a connection with the Union Pacific, you shall have, not all the lands that did in fact pass to the State under the Act of 1856, to aid in the construction of the Air Line Road,

but an amount equal to that originally authorized to be granted to aid in the construction of said road. If the lands can be found in the limits fixed by this act, the value of your lands per acre will be less if your road is built remote from the western portion of the original survey where most of the lands are, but the quantity will be increased and you will have less miles of road to build in order to earn them. This, under a fair and reasonable construction of the Act, was the inducement held out by its very terms to the Company. And such, we submit, is the only construction consistent with the manifest intent of Congress in making the grant; the only construction that held out any inducement to the Company to constuct its road upon the best and most expeditious route to a connection with the Iowa branch of the Union Pacific.

Such is the construction given the Act by the Land Department, as appears by the Burdette letter in evidence and the recent letter of the Secretary of the Interior under date of July 10, 1882, "in response to a resolution of the House of Representatives relating to alleged excess in the certification of lands to certain railroad companies," including the Cedar Rapids & Missouri River Railroad Company, in which the Hon. Secretary, on page 6, uses the following language: "It has uniformly been considered by this office that by the Act of June 2, 1864, hereinafter quoted in part, Congress assented to the disposition made by the State of the lands along the line of the original route; in other words that the lands along the 346¾ miles of the original line were to be used for the construction of a modified line or road 72.74 miles shorter, thus making the

grant equal to about 4,860 acres per mile for constructed road."

II.

But if the construction of the Act of 1864, adopted by the Supreme Court of Iowa is held to be the correct one and that the plaintiffs are only entitled to receive lands to the amount of six sections per mile of the constructed road, still there is a large deficiency in the quantity of land received by the plaintiffs, and they are entitled to the lands in suit.

The length of the constructed line is 271 6-10 miles (37,) the "Lyons Plug," 2 41-100 miles, (p. 49), and the Onawa Branch, 6 miles, (42), being a total of constructed road of 280 1-10 miles, for which the plaintiffs would be entitled to receive 1,075,238 acres Of this amount there has been certified, as before stated, 1,032,396 acres, which includes the first 120 sections which enured and passed to the Air Line Company under the grant of 1856, (which we shall hereafter notice), leaving a deficiency of 42 850 acres, to which the Company is entitled if the same can be found within the limits of the grant.

As to the Clinton & Lyons Branch, called the "Lyons Plug," the State Supreme Court held that the plaintiffs were not entitled to any lands therefor "for the reason that no lands were granted to the Company for that purpose." (p. 128-9). While it is true that no lands were granted literally, *eo nomine* to that line, yet it is believed to be within the scope and purpose of the legislation respecting this grant.

The initial point of the original line was at Lyons City and from it the road was to be built across the

State to the Missouri River. The Air Line Company, the original grantee, had failed to build any road. The Chicago, Iowa & Nebraska Railroad Company between 1856 and 1860 had built a line from Clinton 2 41-100 miles south of Lyons to Cedar Rapids, a point near to and substantially on the Air Line survey or location. The Line is a part of a road connecting the initial point with another point on the original main line. When the State, by the Act of March26, 1860, granted the lands resumed from the Air Line Company to the plaintiffs in the 6th section of the Act (20) there was an express requirement that the plaintiff should build this line and should operate it in close connection forever with all regular trains run on the Chicago, Iowa & Nebraska Railroad, the "intent and meaning being to secure to the Citizens of Lyons the same privileges and benefits of a railroad connection that are enjoyed by any other place" on that road. And it further provided that no lands should be certified by the Governor until that section was complied with. This, in our judgment, was a clear recognition by the General Assembly of this line as a part of the line contemplated by the Act of 1856. Congress also so recognized it by providing in the Act of 1864, (sec. 4). that the Secretary of the Interior should reserve a quantity of land embraced in the grant described in this section, sufficient, in the opinion of the Governor of Iowa, to secure the construction of a branch road from the town of Lyons so as to connect with the main line in or west of the town of Clinton. until the Governor certifies that the branch is completed according to the requirements of the laws of the State. So that, both under the Act of the General Assembly and the Congressional Act of 1864 it is treated as a portion of

the road required to be built and for the construction of which these lands were granted. It is difficult to see why this section of the road should be excluded from the benefits of the grant any more than any other portion of the road built practically and substantially on the route of the original main line.

III.

The evidence shows (see Burdette's letter p. 42) that six miles of the Onawa branch was built from the main line of plaintiffs road to a connection with the Sioux City and Pacific Railroad, which passes through Onawa, and by an arrangement with the Sioux City & Pacific Railroad Company its line became naturally an extension of plaintiffs road, and for all practical purposes was a compliance with the law requiring such a branch to be built.

The act of 1864, section 4 (24), provides that "to aid in the construction of such branch, the *same* amount of lands per mile are hereby granted as for the main line, and the same shall be reserved and certified in the same manner."

Under this provision of the statute it is difficult to see why the plaintiffs are not entitled for the six miles of said branch so constructed to the *same* amount of lands as are granted to the main line.

There is no question but that the six miles constructed is a part of the Onawa branch, built, as far as it was built, by the company, in professed compliance with the requirements of said act.

It is further provided, that the lands granted for such branch should be selected within twenty miles of the main lines and branch. And it appears by the Bur-

dette letter that the lands within the limits of the constructed portion of the branch, as well as those within the limits of the branch, are also within the limits of the main line.

The lands themselves—that is, the public lands within the limits of the main line and branch, have been certified to the plaintiffs, and if the government has *recognized* the claim of the plaintiffs, that the six miles so constructed is a *part* of the Onawa branch, as it appears very clearly it has, and has for more than ten years acquiesced in such claim, and treated it as a compliance with the statute—and further, inasmuch as no specific tracts of lands were granted or set apart for any portion of the road, it does not lie with the defendants to allege that no lands ought to be certified to the plaintiffs on account of the Onawa branch, nor that none of the lands certified were certified on account of that branch.

"No lands," says Commissioner Burdette, "have been certified to it *as such branch*." That is to say by *that name*, but a proper portion of the lands within "20 miles of said main line and branch" which have been certified to the company are properly applicable and inure to the company for the building of the six miles of said branch.

But if this branch is not entitled to any lands, then the amount of six sections per mile for six miles, 36 sections, or 23,040 acres, should be deducted from the 42,840 acres, leaving a deficiency still of 19,800 acres. And rejecting the claim for the Lyons Plug, 2 41-100 miles—9,254 acres, there is still left a deficit of 9,546 acres. To this deficit there should be added in each

case the 76,800 acres, being the first 120 sections decided in the *Courtright* case (*supra*) to have passed absolutely to the Air Line Company.

IV.

The Supreme Court say "More lands have been selected than have been certified, and the former exceeds the quantity the plaintiffs are entitled to. Whether all or any portions of the lands selected will be certified to the defendants by the General Government we have no means of knowing; but think it devolved on the plaintiffs to show that the lands selected had been disallowed, abandoned, or at least in some manner released from the claim made thereto, before other lands could be selected in lieu thereof."

That more lands have been selected than have been certified the record discloses It also shows that these lands selected and claimed by the company are the lands situated north of the 20 mile limit of the modified line, and within the 15 mile limit of the original Air Line (see Steiger's deposition, p. 64-81).

These lists embraced the homestead entries in Monona and other counties, including the lands in suit (123.)

When the lists were filed in the local land offices the officers struck out the homestead entries and refused to certify them (Burdette letter, p. 44, and Steiger's deposition, p. 123).

It is clear from the record that these lands have been claimed by the company, and their claim disallowed, otherwise years ago the lands would have been certified. What presumption arises that the department will take any different action in reference thereto, especially when it is shown, as in the cases at bar, the lands

have been patented, and so far as the land department is concerned are *res adjudicata*.

These suits are brought to test the plaintiffs right to portions of said lands, and other suits are pending with reference to other portions thereof.

Is it a defense to plaintiffs right to these lands that suits are pending with reference to other portions of the same class of lands? If the theory of the Supreme Court is correct, before the plaintiffs can recover any of the said lands that the act of 1864 required the Secretary to reserve and certify to it, there must be an examination and an adjudication of the equities of the respective claimants, and those having the least equities must surrender enough of the lands claimed to fill the grant. This is the logical result of the holdings of the Supreme Court. With these questions we submit, under the pleadings and the law plaintiffs have nothing to do.

The simple inquiry is, Are the lands in suit a portion of those the act of 1864 made it the duty of the Secretary to reserve and certify to the company; if so, upon proof of a compliance with the terms of the grant by the company, the lands must be certified. The only reason that could be lawfully urged for not certifying the lands is that the company had received all the lands it was entitled to. The Court concedes there is a deficiency far in excess of the amount of land involved in the suits at bar, this being so, we urge plaintiffs right to the lands in suit are clear.

Again, we urge the Supreme Court erred in construing the grant of 1864 so that it is made the duty of the company to select the lands within the 15 mile limits of the original Air Line. This, we have seen, the

act does not require, and the courts will not enforce the performance of a work the act does not require. The act makes it the duty of the Secretary to reserve and certify these lands. The act sets them apart and orders them certified to the company. How is the status of these lands changed by selections or claims made to them by the company. It was the duty of the Secretary to certify them before the selections were made; that duty continues after the lists are filed. The duty is no more obligatory upon him after the selections made than before, for the obvious reason that the company's rights to the lands and the Secretary's duty in relation thereto are in no manner dependent upon the selections. The right of the company and the duty of the Secretary are granted and imposed by the act.

If this be so what reason for holding that plaintiff's right to the lands in suit in any manner dependent upon the action of the department upon the lists of selections made of these lands. Equally clear are plaintiff's rights to the lands in suit if any of the lands not certified are within the 20 mile limits of the modified line. As we have seen by the terms of the Act of 1864, that land can only be resorted to after the land within the 15 mile limits of the original Air Line has been certified. What defense can it be to plaintiff's claim of the lands within the 15 mile limits of the original Air Line, that plaintiffs have asked for lands outside the said limits that have not been certified and that can only be certified after the lands within the 15 mile limits have been exhausted; yet the Supreme Court in effect say the presumption the Secretary will comply with the request that lands be certified to which the Company are not entitled, deprives the Company of the lands to which it is entitled to under the grant.

The Court is equally unfortunate in inferring that the lands in suit are selected (or sued for) in lieu of other lands previously selected. As a matter of fact this inference is erroneous. The lands sued for are the identical lands previously selected and rejected by the local land officers. Besides, the lands required by the Act of 1864 to be "selected" are not the lands within the fifteen mile limits, but lands within the 20 mile limits of the modified line. Those lands are not to be certified until all the lands in the 15 mile limits are exhausted. So that if the "lands selected" are of the class lying within the 20 mile limits, it is not necessary to show that they have been disallowed or released before the lands sued for—that is, 15-mile limit lands—are obtained. As we have seen the latter must be first exhausted.

V.

The opinion of the Supreme Court in that portion thereof called in question by the fifth assignment of errors proceeds upon the theory that all the odd numbered sections within the limits of the grant must first be exhausted before the even numbered sections can be taken and that no burden is upon the plaintiffs to show that fact, and that under the construction it gave the grant the proof offered by plaintiffs was insufficient to establish that fact.

In this the Court erred. While the Act of 1856 granted the odd numbered sections within the limits of that grant, the Act of June 2, 1864 filled up the grant of 1856 from the odd and even sections within the limits there fixed. The Act of 1856 gave the State the right to select the odd numbered sections between the six and

fifteen mile limits. This was done Sept. 4, 1856. The State did all the Act required. It then became the duty of the Secretary to certify the land in place and the selected land to the State This duty was performed in 1858 and the approved lists were then furnished the State. The presumption of law is that the Secretary certified all the lands both in the six and fifteen mile limits, enuring to the grant. If this was not done the burden is upon the defendants to show that he neglected or failed to do his duty. It is sought by defendants to overcome this presumption the law raises in favor of the acts of the Secretary by a statement from the Burdette letter from which it appears the estimated area of the grant was 1,298,730 acres. The estimated amount that would enure to the grant within the limits was 800,000 acres; of this amount only 782,250 was certified to the State. The amount that would enure to the grant was only an estimate, and when it is borne in mind that of the amount certified the Courts have held that 109,756, 85-100 acres never belonged to the grant, no very violent presumption arises that the State will ever receive the balance of the estimated amount. Especially is this the case when it is borne in mind that the Secretary has been doing his duty in this respect for over twenty-five years. The Act of 1864 authorized the grant of 1856 to be filled by the lands within the 15 mile limits of the Air Line survey, and if sufficient lands were not found within those limits then land might be selected within 20 miles of the modified line. Now under this grant the Secretary has certified to the Company 226,263 2-100 acres within the 20 mile limits of the modified line. (p. 49), not an acre of which could be lawfully certified until both the odd and even sections

within the 15 mile limit of the original Air Line had been certified. Such are the positive terms of the grant and if the theory of the Supreme Court be true the Secretary has not only neglected his duty but has violated the terms and conditions of the grant of 1864. Clearly before such a presumption of wrong doing can prevail there must be proof. In this portion of the opinion the Court imposes upon plaintiffs the duty of making the selections required of the State under the Act, and visits upon the plaintiffs the consequences of the supposed failure of the Secretary to perform his duty under the law. The State made the selections under the Act of 1856 and to the State the lands enuring to the grant were certified. Now can the mere presumption that all the lands which ought to have been certified to the State have not been certified deprive the plaintiffs of lands which clearly passed under the Act of 1864. Yet such results follow the presumption of neglect and wrong-doing of the Secretary.

VI.

As the questions raised by the 6th and 7th errors assigned are substantially alike we shall discuss them under one head.

It being conceded, in the opinion of the Supreme Court, that the plaintiffs had not received all the lands to which they were entitled, that Court must have erroneously held that the rights of the plaintiffs to the land in suit, had not attached thereto, under the grant, at the date of the inception of the defendants' homestead entries—that such rights were dependent upon the selections made and the rulings of the Department thereon, and that they were lost by the failure of the

Secretary to certify the lands under the grant, or that they were in some manner forfeited.

We first inquire, when did the plaintiffs acquire an interest in the lands which enured to the grant?

It has been repeatedly held that the grants under the Act of May 15, 1856 and June 2, 1864, are grants *in præsenti*.

Grinnell v. R. R. Co., 103 U. S. Supreme Court, 739.
Railroad Co. v. Grinnell, 51 Iowa, 477.
Schulenberg v. Harriman, 21 Wall., 44.
Sweet 106 U.S. R. 360.

In *Blair Town Lot & Land Co. vs. Kitteringham, 43 Iowa, 462*, the Court says: "The Act of June 2, 1864, like the Act of May 15, 1856, is a conditional grant *in præsenti*."

The Court says, in the case of *R. R. Co. vs. Grinnell, supra*; "The grant having attached upon the line "of the road being definitely fixed, and the indemnity "lands being duly selected, the company to whom the "State transferred the property acquired a valid and "certain interest in the identical land designated by "such location of the road and selection."

The grant of June 2, 1864, so far as the lands embraced within the fifteen mile limits of the Iowa Central Air Line Railroad, was a grant *in place*. The line of road had been surveyed and definitely located and a map filed in the office of the Secretary of the Interior in 1857, showing the location thereof. At the time this grant was made, the limits of the Air Line grant were definitely fixed, and nothing further was required to be done to give precision to the grant, and immediately upon the passage of the Act of June 2, 1864, the title to the lands embraced within the said fifteen mile

limits of the Iowa Central Air Line, vested in the Company, conditioned only, upon construction of the road, in accordance with the terms of the grant.

The authorities above cited hold that if the grant is a float, the location of the line of the road gives precision to the grant and attaches it to the particular lands embraced within its limits. It follows if the limits of the grant are fixed at the time the grant is made, the grant must attach at once to the lands embraced within its limits.

In *B. & M. R. R. Co. vs. Lawson, 58 Iowa, 145*, the Court say "It will be observed, however, that by "the amendatory Act of 1864, the grant was made defi- "nite and certain by reference to the line of road as "then located. The line having been fixed and deter- "mined as required by law, the grant was no longer a "float, but the lands were susceptible of accurate, cer- "tain and determinate description and designation."

M. K. & T. R. R Co. v. K. P. R. Co., 97 U. S., 491-7.

From these adjudications it is clear that the right of the plaintiffs to the lands within the fifteen mile limits of the original line attached at the date of the Act.

What was the nature of the right and interest which the Railroad Company acquired in the lands? "This interest and title" acquired by the Railroad Company under the grant of 1856, say the Court in the *Grinnell* case, (*supra*) "was conditional, depending upon the com- "pletion of the railroad, but could not have been de- "feated except for non-performance of the conditions."

In the case of *Grignon's lessee v. Astor, et al., 2 Howard, p. 344*, the Court, speaking of the effect of a grant of lands by Congress, say: "It was a higher evidence of title as it was the direct grant of the fee

which had been in the United States, by the government itself, whereas the patent was only the act of its ministerial officers."

In *Stoddard, et al. vs. Chambers, 2, Howard, p. 316*, the Court say: "A confirmation by Act of Congress vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence of this."

In *B. & M. R. R. Co. vs. Hayne, 19 Iowa, 140*, the Court, in construing the railroad land grant of 1856, uses this language. "This is not unlike a class of grants made by Congress which have often received a judicial construction, and have been held to pass at once the title to, and vest the seizin in the party named therein as grantee."

In *M. K. & T. R'y Co. vs. K. P. R'y Co., (supra)*, the same doctrine is clearly and forcibly stated, and the rights acquired under similar Congressional grants received the same construction.

From the authorities cited it is evident that the Company would be entitled to a conveyance of the lands granted upon a compliance with the terms and conditions of the grant.

What then are the requirements of the Act?

Section 4 provides that whenever said main line shall have been established the Company shall file in the General Land Office a map definitely showing such modified line. From the language used it is evident it was not contemplated that the map of the modified line should be filed at once; it would necessarily require time to make the surveys and locate the line and prepare the map. The words "whenever the modified main line is established," certainly is not very definite in time, and this, it will be seen, is the only require-

ment in reference to the filing of the map or location of the modified main line. Neither is there any requirement that the entire modified line be located at once or the map of the entire line be filed at one time.

As before shown, the change in the location of the line was not for the purpose merely of securing a *better route* to the Missouri River, but for the purposes of securing a more *expeditious* line, and to a connection with the Iowa Branch of the Union Pacific Railroad. These two objects are coupled all through the act, and could not be severed by the plaintiff. If it modified its line, it was its duty to make such modified line connect with the Union Pacific Railroad.

The modification for that purpose was then contemplated, and the additional grant was made on that condition. and to aid in that purpose.

The evidence shows that a preliminary map was filed in 1865. This map was incomplete. It definitely showed the modified line so far as Missouri Valley, but it did not pretend to show the line to its connection with the Union Pacific Railroad. A map showing such extended line, completing it as contemplated by the act, was filed in 1867.

The Secretary and Commissioner have accepted and approved such amended map by recognizing the length of the road as determined by the combined maps.

It has been the ruling of the departments, following the opinion of the Attorney General, that the map of a line of road required to be filed by act of Congress, need not all be made and filed at one time.

If, when all the maps are filed, they unitedly show the definite location of an entire line, that is sufficient.

John I. Blair, President of the Cedar Rapids and Missouri River Railroad testifies (72) "that the western terminus of said road is at a point on the Missouri River, opposite Omaha * * * * * The remainder of the modified line was located subsequently to the filing of the map of July 11, 1865, referred to, though this part of the line was contemplated and intended to be constructed, and a map of the last part of the modified line was filed by me in the department at Washington December 19, 1867. The point on the Missouri river indicated on the map filed July 11, 1865, is not the terminus of the modified line of the Cedar Rapids and Missouri River Railroad, nor was that point ever intended to be the western terminus of the modified line."

The act of 1864 contemplated the road, for the building of which the aid was granted, should be constructed to a connection with the Iowa branch of the Union Pacific; the terminus of which had been located at a point on the Missouri River opposite Omaha. This is clearly contemplated and provided for in the act.

The United States, the grantor, the State of Iowa the trustee, under the act of 1856, and the Railroad Company the beneficiary under the grants have so construed the act, and strangers to the grant, whose right, if any, accrued long after the grants to the State and to the Company, are in no position to call in question the correctness of the construction given the acts by officers of the State and General Government.

And in the absence of all proof denying the western terminus of the road to be, not only, where the located line, but the constructed line, show it to be, we may

with confidence urge, that the point opposite Omaha is the terminus, and not the Missouri River west of Missouri Valley, to which point the road was never built, and as the President testifies, never was designed to be.

The map shows this to be the modified line authorized by the act.

The other requirement was the construction and completion of the road on the line indicated. That this was done the testimony of Mr. Blair (72) and the certificate of the Governor (37-8) conclusively prove; and, also, that it was done within the extended time prescribed by the act of Congress, approved March 3, 1865 (77).

Nothing further was required of the company to entitle it to the lands within the 15 mile limits. It had complied with every condition imposed by the granting act, and thereupon it became and was the duty of the Secretary to certify all the lands within the 15 mile limits of the original main line, if they were needed to fill the grant. That they were all needed the record puts beyond all question. 226,263.02 acres within the 20 mile limits of the modified line were certified to the company, not an acre of which could be certified until the lands within the 15 mile limits had been exhausted, and still there is a large deficiency under either theory respecting the grant.

That the Company were entitled to these lands upon the construction of the modified line is apparent from the duty imposed by the Act upon the Secretary of the Interior.

His duties, under the act of June 2, 1864, are clear. The requirement is imperative that he "shall reserve

and cause to be certified and conveyed to the Company from time to time, as the work progresses on the main line, out of any public lands *now belonging* to the United States * * * within 15 miles of the original main line." Not out of any lands which the government *may own* within said limits when the map of the modified line is filed, but out of land *now owned* by the United States; showing clearly that as to the lands within the 15 mile limits of the original main line Congress intended the grant should attach at once.

The deficiency in the original grant was manifest. Congress recognized the fact and made provisions in this act for making up the deficiency—hence the language "out of land *now*"—at the date of the passage of this act—owned by the United States.

The theory of the defense that the department might sell or dispose of lands within the fifteen mile limits of the original Air Line survey until the modified line had been located, the map filed, and the selections made by the company, finds no countenance in the plain terms of the act. And where the Secretary of the Interior is directed to certify and convey to the company the lands within prescribed limits, which the United States *then* owned, it was an appropriation of the land by Congress, and the officers of the government could not afterwards sell or otherwise dispose of them, as we shall hereafter see.

The Secretary of the Interior and the Commissioner of the General Land Office so construed the act. The letter from *J. M Edmunds, Commissioner, to Hon. J. P. Usher, Secretary of the Interior, under date of June 25, 1864* (31), states: "That after a careful reading of the law, approved June 2, 1864, * * * * I am

satisfied that it operated upon *all* public lands belonging to the United States at the date of said enactment, and lying within the prescribed limits of the several lines of road mentioned, saving rights of prior inception, consequently not only takes hold of the odd numbered sections, but the even numbered sections also."

The Commissioner, J. M. Edmunds, under date of May 30, 1865, in reply to a letter from Hon. James Harlan, Secretary of the Interior, repeats the construction he had before given the act of June 2, 1864, in his letter of June 25, 1864, above cited, and further says (33): "It will be seen from the aforesaid instructions of June 16, 1864, to the land offices in Iowa, that no vacant public lands in the State are now subject to ordinary private sale or location, and as the several railroad interests are considered fully protected by law, I can see no advantage to be gained, either by the State or General Government in continuing to withhold these lands from market, but on the contrary, think that both interests would be promoted by their restoration to sale as requested in the letter referred to, so as not to interfere with the grants under act of June 2, 1864, and May 12, 1864."

On the second day of June, 1865, in reply to the foregoing letter of May 30, 1865, the Secretary of the Interior approved of the construction given the act of June 2, 1864, and the views of the Commissioner in reference to the right of the railroad companies being fully protected by law, and the Commissioner was instructed to carry out his views as given in said communication of May 30, 1865 (33).

The construction given by the officers of the executive department of the government, whose duty it was

to construe and carry into effect the provision of the act of June 2, 1864, have never been changed, and the rulings of the department, in the numerous cases involving those questions, have been in accordance with the construction given by the Commissioner and Secretary of the Interior, near the time of the passage of the act (see also Burdette letter, p. 44).

And this construction is in harmony with the decisions of the courts as we have seen.

It must be borne in mind in construing the act of 1864, that, unlike the act of 1856, it makes no provision for the selection of other lands in lieu of land that might be sold or otherwise disposed of after the passage of the said act, and before the location of the modified line; and gave to the company no right to protect itself by selecting lands that would inure to it within the 15 mile limits of the original main line.

The object Congress had in view in making the grant of 1864, as we have seen, was to hasten the construction of the road to the Missouri River, and to a connection with the Iowa branch of the Union Pacific. The additional grant was held out as the inducement. To hold that the government might sell and dispose of the lands it held out as the inducement to build the road, until the modified line could be located and the map filed, would be holding out inducements to the company that never could be realized, and make the whole scheme a sham and a fraud.

It being established then, that it was incumbent on the Secretary to reserve, certify and convey these lands, can his failure so to do operate to defeat the right of the company thereto. No act, performed or neglected, by any officer of the Land department, could have this effect.

The act provides in clear terms that the Secretary of the Interior shall reserve and cause to be certified and conveyed, the lands within the limits of the grant to the company. Now, upon what theory can it be urged that the Secretary was not to do just what the act in plain terms required him to do? And if he was required to do an act in carrying into effect the grant, under the law he was clothed with all the powers necessary to enable him to perform the act. If lists were needed he not only had the power, but it was made his duty to provide them. And as all the lands within the 15 mile limits of the original main line, which the United States *then* owned, passed under the grant, all that remained to be done, as to the lands within those limits, was to determine from the record of the Department, the lands owned by the United States at the date of the grant. This was peculiarly within the knowledge of the officers of the Land Department, and the act made it their duty to set apart and certify the lands. The method of doing it was left to the officers charged with the duty, and if, within the limits where all the lands were granted, the Secretary of the Interior did not deem it necessary to make lists, a stranger to the grant cannot complain.

It is well settled that the failure of an officer of the Government charged with the performance of a duty in carrying out the grant of Congress, cannot defeat the rights of the grantee to the lands granted.

The Supreme Court of the United States say in the case of the *Hannibal & St. Joseph Railroad Company, vs. Smith, 9 Wallace, 99*, speaking in reference to the swamp land grant: "Must the State lose the land "though clearly swamp, because the officer (referring

"to the Secretary of the Interior) has neglected to "furnish the lists of these lands? The right of the "State did not depend on his action but on the act of "Congress, and though the State might be embarasssed "in the assertion of this right by the delay or failure "of the Secretary to ascertain and make out lists of "these lands, the right of the State therein could not "be defeated by that delay." In this opinion the Court hold "the swamp land grant and railroad grant, under "the act of 1856, are each grants *in præsenti* and passed "to the State a present interest in the lands embraced "therein."

In *Morton vs. Nebraska, 21 Wallace, p. 674*, the Court say: "It appears by the record that on the survey "of the Nebraska country, the salines in question were "noted on the field books but these notes were not "transmitted to the Register's general plats, and it is "argued that the failure to do this gave a right of entry, "but not so, for the words of the statute are general "and reserve from sale or location all salines whether "marked on the plats or not." See also, *Strong vs. Lehman, 10 Ohio St., p. 99.*

The Supreme Court of Iowa, in construing the Acts under consideration in *B. & M. R. R. Co. v. Lawson, 58 Iowa, 145*, say: "By the Acts of 1856 and 1864 the rights of the Railroad Company did not depend upon the withdrawal of the lands nor upon the notice of such withdrawal."

"When the line of the road was definitely fixed the lands were not subject to homestead entry and an enterer could acquire no rights against the grant under the act." (*Blair &c. Co v. Kitteringham, 43 Iowa, 462.*)

And even if the act had made it the duty of plaintiff to select the lands, its failure so to do would not work a forfeiture of its rights under the grant and vest the title in the Government.

In *Cooley on Constitutional Limitations, 3d Ed, p. 362*, it is laid down as the settled rule that a party cannot by mis-conduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscations without a judicial hearing after due notice would be void as not being due process of law.

In the case of *Bennett vs. Hunter, 9 Wallace, p. 328*, the Court in construing the Act of June 7, 1862, which in the fourth section thereof provides, that the title of, in and to each and every piece or parcel of land upon which said tax has not been paid shall thereupon become forfeited to the United States, say: "And we have first "to consider whether the first clause of the section *pro-* "*prio vigore* worked a transfer to the United States of "the land declared to be forfeited. Now, the general "principles of the law of forfeiture seem to be incon- "sistent with such a transfer. The title, indeed, was "forfeited for the non-payment of the tax; in other "words, it became subject to be vested in the United "States, and upon public sale became actually vested "in the United States, or any purchaser, but not before "such public sale."

There has, in fact, been no resumption of this land by the United States. All the conditions of the acts under which the land is claimed have been fully complied with; but even had they not been complied with the

company could be divested of its rights under the respective grants, only by some act of the granting power, resuming the grant, or by a decree of the court declaring a forfeiture.

In *Shhulenberg vs. Harriman, 21 Wallace, page 64*, the Court say: "And it is settled law that no one can "take advantage of the condition subsequent annexed "to an estate in fee, but the grantor, or his heirs, or the "successors of the grantor, if the grant proceed from "an artificial person, and if they do not see fit to assert "their right to enforce a forfeiture on that ground. the "title remains unimpaired in the grantee. The author- "ities on this point, with hardly an exception, are all "one way, from the Year Books down, and the same "doctrine obtains when the grant upon conditions pro- "ceeds from the government. No individual can assail "the title it has conveyed, on the ground that the "grantee has failed to perform the conditions annexed. "If the grant be a public one, the forfeiture must be "asserted by judicial proceedings authorized by law, "the equivalent of an inquest of office at common law, "finding the fact of forfeiture and adjudging the restor- "ation of the estate on that ground, or there must be "some legislative assertion of ownership of the proper- "ty, for the breach of the condition, as an act directing "the possession and the appropriation of the property, "or that it be offered for sale or settlement. In the "present case no action has been taken, either by legis- "lation or judicial proceedings, to enforce a forfeiture "of the estate granted by the acts of 1856 and 1864. "The grant remains, therefore in the State as complete- "ly as it existed on the day when the title by location

" of the route of the railroad acquired precision and be-
" came attached to the adjoining alternate sections."
See, also,

The United States vs. Repentigney, 5 Wallace, 267.
Nichols vs. The New York and Erie R. R. Co., 112 N. Y., 137.
Dewey vs. Williams, 40 N. H., 222.
Southard vs The Central R. R. Co. of New Jersey, 2 Dutcher, 13.
Bellows vs. Cap, 20 N. H., 501.
Sperry vs. Sperry, 8 N. H., 477.

Neither could the Commissioner of the Land Office or Secretary of the Interior impose by regulations of their office any duties upon the grantee, not required by the act of Congress making the grant. True, they might by their rules and regulations embarrass and delay the adjustment of the grant, if the grantee failed to comply with the requirement of the office, but could not deprive the beneficiary under the grant of any right conferred. The officers of the Land Department act under the law, and only when the rules and regulations are in accordance therewith, can they be sustained. No rights can be lost by the failure of the Secretary of the Interior to discharge a duty required, and none gained by an unauthorized act of his. The authorities cited fully sustain this position.

Though no forfeiture of the Company's rights had been declared to the lands in suit, defendants claim a superior right to said lands based upon the assertion of the Land Department in declaring the public lands in the State of Iowa with-drawn from sale under the order of June 16th, 1864, subject to homestead and pre-emption entries.

The fact is established beyond question that on the 16th day of June, 1864, all the lands in the State were withdrawn from pre-emption and homestead entries, for

the purpose of adjusting the grant of June 2, 1864. On that date J. M. Edmunds, Commissioner, addressed a letter to the Register and Receiver of Land Office at Sioux City, Council Bluffs, Fort Dodge and DesMoines so directing the withdrawal of all the public lands in their respective land districts for sale, location, homestead entry or pre-emption claim (30).

The lands embraced within the grant of 1864 were never restored to market, or open to homestead or pre-emption entry.

As we have seen, the Commissioner, on the 25th day of June, 1864, in a letter addressed to the Secretary of the Interior, held that the grant of 1864 operated upon public lands belonging to the United States at the date of the grant, and lying within the prescribed limits of the several lines of road (31).

Such was the view the Department entertained with reference to the rights of the Company, and while entertaining such views, the letter of August 25, 1864, (46), was issued, restoring to homestead and pre-emption entry the government lands withdrawn by the order of June 16, 1864. While the language of the letter is unguarded, yet clearly the Department never designed by this instruction to authorize homestead and pre-emption entries on land that had passed to the Company. It had no power or authority to do so, and when properly construed the language "public lands" cannot refer to lands already appropriated. The subsequent letter and instructions of the Secretary and Commissioner show there had been no change of views in regard to the rights of the Company and the status of the land. On the 30th day of May, 1865, he expressed the same view in a letter to the Secretary of the

Interior, with reference to the said grant, and furth- stated that "The several railroad interests are fully protected by law." And in this view, he saw no objection to restoring the lands to sale "So as not to interfere with the grants under the acts of June 2 and May 12, 1864" (32). In these views the Hon. Secretary of the Interior concurred on the 2nd day of June, 1865, and the Commissioner was requested to carry the same into effect (33).

Now, what lands were to be restored to market and rendered subject to homestead and pre-emption entries? The unappropriated lands were the only lands the Secretary of the Interior could restore to sale. An attempt to restore the appropriated lands would be a nullity and the order therefor absolutely void.

But it is evident the Secretary of the Interior and the Commissioner never designed to open to homestead and pre-emption entry any other lands than the unappropriated public lands. These are the only lands subject to entry under either of these acts.

Then, too, the construction given the act of 1864 by the Secretary of the Interior and Commissioner, holding that the grant took effect at the date of the act, is conclusive upon this question, for it will not be presumed that the Secretary of the Interior and Commissioner designed to restore to pre-emption and homestead entries lands already granted.

In accordance with these views, on the 7th day of June, 1865, the Commissioner addressed a letter to the Register and Receiver at Council Bluffs, Sioux City, &c., as follows (34):

"DEPARTMENT OF INTERIOR, June 7, 1865.

"Register and Receiver, Council Bluffs:

GENTLEMEN—On receipt here of "you will allow no entries for homesteads, pre-emptions or locations, for any purpose, in your district on the even numbered sections lying within the 15 mile limits as fixed under the act of May 15, 1856, and shown upon the diagram heretofore furnished your office, nor upon any of the sections, odd or even, within the additional five miles or 20 mile limits on each side thereof, granted by act of June 2, 1864, of the following railroads, viz: The Burlington and Missouri River Railroad, the Mississippi and Missouri River Railroad, the Cedar Rapids and Missouri River Railroad.

"In the meantime any entries or locations which have been permitted by you under existing instructions, subsequent to 2d of June, 1864, except those of prior inception, will be held in suspense for investigation and adjustment at this office. You will please acknowledge receipt of this letter.

"J. M. EDMUNDS,
"*Commissioner.*"

On the 6th day of July, 1866, two lists of lands were forwarded to the Land Office at Council Bluffs which had been withheld from ordinary private entry for the purpose of adjustment of land grants to the State of Iowa for railroad purposes, and the same were ordered held subject to homestead and pre-emption entry (34, 43-4). These lists erroneously embraced the lands entered by defendants in most of the land suits pending in Monona county (81). Erroneously, we say, because the Secretary of the Interior and Commissioner had decided the said land had passed to the Railroad Company under the grant of June 2, 1864, and because the notice in said letter of July 6, 1866, referred to, being Notice

711 (116), ordered a restoration of *public lands* only; and for the further reason, that on the 23d day of August 1866, Jos. S. Wilson, Acting Commissioner, in a letter of that date, addressed to the Register and Receiver of the Land Office at Sioux City, in reply to inquiries addressed to the Commissioner with reference to lands within the five, fifteen and twenty mile limits of the Cedar Rapids and Missouri River Railroad, says:

"DEPARTMENT OF THE INTERIOR,

"GENERAL LAND OFFICE, Aug. 23, 1866.

"Register Land Office Sioux City, Iowa:

"SIR—In reply to your letters of the 16th inst. I have to state that the even numbered sections within the five, fifteen and twenty mile limits of the Cedar Rapids and Missouri River Railroad are not subject to homestead or pre-emption, whilst all the lands designated in the list of vacant lands sent you are subject to both of said laws.

"JOS. S. WILSON,

"*Acting Commissioner.*"

There can be no question, under the construction given the order by the Commissioner, that the including of the granted lands in the lists subject to homestead and pre-emption entries was a mistake. The defendant's claim is reduced to this: That an entry allowed by mistake of granted land divests the grantee (Railroad Company) of title. In no other case would it have that effect. We have seen that an entry allowed by the officers of the Land Department of land previously granted is void. Can an entry allowed through mistake be any more valid.

The grant has never been adjusted (see Lippencott letter 90).

The Cedar Rapids and Missouri River Railroad Company never consented to the offering of these lands for pre-emption and homestead entry.

John I. Blair testifies he claimed for the road all the government lands within the limits fixed by the grant soon after the grant was made, and urged the Department at different times to certify them (62).

W. T. Steiger, the agent of the Company, objected to the allowance of homestead and pre emption entries upon the lands within the limits of the grant, and from time to time brought cases before the Department to test the validity of the entries. These cases were decided in favor of the Company and the entries canceled (61)

The Department refused to entertain those cases in which a patent had issued, leaving the courts to settle the rights of the respective claimants (see Burdette letter, 39).

In the case *Stoddard vs. Chambers*, *2 Howard*, 318, the court say: "The patent of the defendant having been for land reserved from such appropriation is void."

In *Wilcox vs. Jackson*, *43 Peters*, *p. 512*, the court hold: "That the appropriation by government of the public lands is nothing more nor less than setting apart the land for some particular use. That whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it or operate upon it, although no reservation were made of it."

In *Arnold vs Grimes and Chapman*, *2 Iowa*, *p. 1*, the court hold: That land once sold or appropriated by

the Government, even though not patented, cannot be sold again."

In *Polk's Lessees et al. vs. Wendell et al., 9 Cranch, p. 101*, the court say: "After that cession the State of North Carolina had no power to sell an acre of land within the ceded territory. No right could be acquired under the laws of that State."

In the case of *Blair Town Lot and Land Company vs. Kitteringham, 43 Iowa, p. 465*, the court say: "The defendant acquired no right as against the railroad company by entering upon the premises in dispute under the homestead act, and his application for the land (embraced within the grant of 1854) was properly refused by the Receiver of the Land Office."

In *United States vs. Stone, 2 Wallace, p. 537*, it is held that the act of the Secretary of the Interior in ordering a survey to be made of lands erroneously reserved was a nullity, the same being in excess of his authority.

In *Reichard vs Felps, 6 Wallace, p. 164*, the court say (plaintiff holding title to the land under a patent), "the land having thus been previously granted, reserved from sale or appropriated, the patents of 1838 and 1853 are void."

See *Wolcott vs. The Des Moines Company, 5 Wallace, p. 688, Bellows vs. Todd, 34 Iowa, p. 29.*

An examination of the statutes under which the pre-emption and homestead entries are authorized will lead to the same conclusions. Pre-emption and homestead entries can only be allowed on unappropriated public lands, so the acts granting the respective rights expressly provide. See pre-emption law approved September 4, 1841, Sec. 10, 5 Vol., U. S. Stat. at large,

p. 455.; also homestead act approved May 20, 1862, 12 Vol., U. S. Statutes at large, p. 392, section 1.

Under the pre-emption and homestead acts only unappropriated land could be entered. The proclamation of the President could not extend the pre-emption or homestead rights to land not subject to entry under said acts.

We have examined the authorities for the purpose of ascertaining what the consequences would be of a failure of the grantee to comply with the regulations and requirements of the Land Office in making the lists of lands claimed to inure to the Company under the grant. The rights conferred by the grant could not be defeated by any such failure. The Railroad Company asserted its claim to all the vacant lands within the fifteen mile limits of the original Air Line survey and within the limits of the modified line.

John I. Blair testifies, (72), "I claimed for the road "all the vacant lands within the fifteen mile limits of "the grant of 1856, and also all the vacant lands within "the limits of the modified line under the act of June "2, 1864. Soon after the passage of the act of June 2, "1864, as the agent of said road I made a formal appli- "cation to the Land Department at Washington for "the certification to the said road of all the vacant "lands inuring to the said road under acts of Congress, "and from time to time I personally urged the Com- "missioner of the General Land Office to adjust the "grant and certify the lands. I also employed Wm. T. "Steiger of Washington, D. C., an agent of the Com- "pany, to urge upon the Department the adjustment "of the grants."

The testimony of Wm. T. Steiger (61) discloses that for the purpose of assisting the Department in the adjustment of the grant from time to time, lists were made out of such lands as inured to the Company under the grant. In April, 1869, Steiger looked over the records of the Land Department, at Washington, and made out corrected lists upon which the lands in question were entered, and while making the examinations of the records for the purpose of preparing the lists, he discovered the erroneous action of the Department in allowing homestead and pre-emption entries of lands within the limits of the grant of 1864; and as this was done under the erroneous construction given to the order of the Department restoring the government lands to market, rendering these subject to homestead and pre-emption entries, efforts were made to have the erroneous order set aside, and cases were brought before the Department for that purpose, in which the lands embraced within the limits of the grant of 1864 were held by the Department to have passed to the Railroad Company under the grant. (See Burdette letter, 39.)

The witness Steiger further states, (64): "That the "lands in controversy north of the twenty mile limits "in Monona County were persistently claimed by the "Railroad Company and its agents, both before and af- "ter the fact was known to them that they had become "inadvertently restored to market in 1867." These lands as will be seen by an examination of the map showing the limits of the Air Line grant, are within the fifteen mile limits thereof, but north of the twenty mile limits of the modified line.

Steiger's testimony shows that cases involving the question of the rights of the Company to the lands within these limits under the grant of 1864 were presented to the Department and were decided by the Commissioner and Secretary of the Interior from time to time, establishing the rights of the Company to the lands granted.

On the 26th day of March, 1876, William Regan agent for the Company, made out and filed a list embracing all the lands in controversy as inuring to the Company under the grant of 1864.

The officers of the Land Offices in the State were notified on the 20th day of September, 1866, by the Commissioner, (35), "That the act of June 2, 1864, grants " to the several roads therein mentioned in the State of " Iowa, all the vacant public lands—odd and even num- " bered sections within the limits of each, twenty miles " —hence *no* homestead entry or pre-emption claim " which was initiated *after* the passage of said law, will " be approved. You will therefore disallow all the " claims and notify parties who have been permitted to " make them heretofore, that said claims will be can- " celed by this office. Jos. S. WILSON,

Commissioner."

In the Burdette letter (44), after referring to the order of September 20th, 1866, the Commissioner says: " the Cedar Rapids and Missouri River Railroad Com- " pany demand the cancellation of certain entries " (among others), made upon lands outside of the twen- " ty mile limits of the modified line. In the view of " this office no valid objection can be made to this de- " mand, except where patents have issued such cases " are considered *res adjudicata*."

Clearly showing, that in the view of the Land Department at that date, January 19, 1876, the question as to the selection of the lands and making of lists had nothing to do with determining the rights of the Company, and if the Land Department do not complain that the Railroad Company have not complied with the regulations of the Land Office, a stranger cannot be heard to do so. Neither does the record sustain the theory of the defendant of the abandonment of the lands by the Company. It has been delayed, put to trouble and expense to get what the act clearly gave it, by the wrongful act of the local officers, in aid of defendant's efforts to deprive the Company of what the grant gave it.

Neither does the claim made by the Cedar Rapids and Missouri River Railroad Company to lands not within the grant defeat plaintiffs' title to lands actually granted.

It is argued by the defendant that the Railroad Company, having once claimed the 109,756.88 acres of Des Moines River lands, the 120 sections held by the courts to have passed to the Air Line Railroad Company, and 1,000 acres of other lands which in fact never belonged to the grant, that plaintiffs are estopped from asserting title to lands embraced within the grant, which were entered or taken under the homestead act, during the time the lands were so claimed. In other words, the assertion of a void claim to one tract of land defeats a valid title to another tract.

There was nothing in the action of the Railroad Company, or of the United States, in respect to these lands, that establishes or tends to establish such estoppel,

The plaintiff never abandoned its claim to the lands now in litigation. There is no evidence to show that the defendant ever knew that the plaintiff claimed the river lands, or ever made any representations or declarations in respect to the matter, or that defendants are now in any worse position by reason of such claim, or took their homesteads by reason thereof. There was never any adjustment of the grant on the basis of such claim. The evidence fully shows that the plaintiff at all times protested against the allowance of homestead or pre-emption claims upon lands within the grants.

The question of estoppel under like circumstances has received judicial determination in several cases.

In the case of *Heinshaw vs. Bissell*, 18 *Wallace*, *271* the court say: "That Larkin, who prosecuted the claim under the Flugge grant for confirmation, had previously located it on land selected farther north than the tract surveyed and finally patented to him, and had announced to others that his claim covered the land thus selected. It was undoubtedly his desire to have his claim located where he had placed it. The survey made by the Surveyor General, both preliminary and subsequent to the confirmation, place the land in the same locality. * * * * There does not appear to have been any intention on the part of Larkin to mislead any one as to the nature of his rights. He was satisfied to keep the land originally selected by him, and he contended, and those who succeeded to his interests contended, for the correctness of his selection, but the Government, through its appropriate officers, interfered and asserted that another and different location was required by the grant. There is, therefore, no case for the application of the doctrine of equitable estoppel,

for its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. * * * * Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct, which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredients and and seldom work any such results." See, also, *Whittaker vs. Williams, 20 Conn., 104.*

In *Brewer vs. Railroad, 5 Metcalf, 479*, the court say: "A party is not to be estopped to prove a legal title to his estate by any misrepresentation of its locality made by mistake, without fraud or intentional deception. * * * * And it would be most unjust that a party should forfeit his estate by mere mistake." (*Deliplaine vs. Hitchcock, 6 Hill, 16*; *Biddleboggs vs. Merced Mining Co., 14 Cal., 367.*)

The case of the *D. & S. C. R. R. Co. vs The D. M. V. R. R. Co., 54 Iowa, 89*, holds that the certification of lands upon the East Branch of the Des Moines River by mistake does not deprive the grantee of the lands embraced in the grant. "If defendant or the State gained anything by the mistake it is not a ground upon which plaintiff can defeat defendant's title. Surely it cannot be maintained that the grant of lands upon the River is affected by mistaken selections upon the East Branch, even should such selections operate to the prejudice of plaintiff. The grant cannot be defeated in that way. The defendant holds, under the grant and

mistakes of the officers of the Government, cannot change the subject of the grant."

The grants under which plaintiff claimed were public grants. Its acts were public acts. Defendant had all means of knowledge open to the plaintiff, and had in no respects been deceived by plaintiff.

Neither do the statements in the petition filed by the railroad company in the District Court of Woodbury County in 1869, in a case in which this defendant was not a party possess any of the elements necessary to constitute an estoppel (84). Neither the officers of the Land Department or the defendant could in any manner have been influenced in their action by the recitals therein, for the obvious reason that they acted some two or three years prior to the filing of said petition.

There is not a syllable of testimony showing that the officers of the Land Department were deceived or misled by any acts or declarations of the officers and agents of the railroad company in respect to the claim that the lands passed under the grant, or that any action was taken, based upon a supposition that the lands had been abandoned. But on the contrary, the testimony shows that all the vacant lands were claimed by the company within the limits of the grant, and the officers of the Department held that they all passed under the grant.

Neither does the testimony show defendant was influenced in his action by any statements, acts, or failure of the Railroad Company to select the lands.

The Commissioner, in the Lippencott letter, written February 4, 1876, stated that the Department did not then regard the grant as adjusted, and the railroad company claimed the right to then make selections, which right was accorded them by the Department. (92).

And with such views, it seems idle to urge that lands the Department had always held passed to the company under the grant, were held liable to homestead entry by reason of any acts or omissions of the officers of plaintiff. The simple facts are as stated by the Commissioner in the Burdette letter: the entries were allowed by mistake.

And with the positive statement made in the Burdette letter, which defendant has introduced in evidence, that these entries were allowed upon lands in the fifteen mile limits of the original main line, by mistake, it seems useless to invent theories or draw upon the imagination to account for the allowance of such entries.

The defendant further relies upon the Act of Congress of April 21, 1876, as confirming or establishing his title.

The act of 1864, under which the lands in suit passed to the Cedar Rapids and Missouri River Railroad, was a grant *in præsenti*. Upon the passage of the act, the interest of the company vested in the lands embraced *within the limits of the grant.*

And after rights have vested, they cannot be divested by any subsequent act of Congress. So the courts have repeatedly held.

There are certain well settled principles that must be applied in the construction of every legislative act.

In the case of *Dash vs. Vonvleck, 7 Johnson, p. 477*, the court lays down well settled rules for the construction of statutes, among which are:

"That a statute is not to be construed so as to work destruction of a right previously attached."

"The court will presume, out of respect to the law given, that the statute was not meant to operate retrospectly."

In *Newland vs. March, 19 Ill., 384*, the court lay down a rule of construction to be applied in construing statutes similar to the act of April, 1876, and say: "Whenever an act of the Legislature can be so construed and applied as to avoid conflct with the constitution, and give it the force of law, such construction will be adopted by the court. Therefore the acts of the legislature, in terms retrospective, and which, literally interpreted, would invalidate and destroy vested rights, are upheld by giving them prospective operation only; for, applied to and operating upon future acts and transactions only, they are rules of property under and subject to which the citizens acquire property rights and are obnoxious to no constitutional limitations; but as retro-active laws, they reach to and destroy *existing* rights, through force of the legislative will, without a hearing or judgment of law. So will the acts of the legislature having elements of limitation, and capable of being so applied and administered, although the words are broad enough to, and do, literally read, strike at the right itself, be construed to limit and control the remedy; for as such they are valid, but as weapons destructive of vested rights they are void; and such force only will be given the act as the legislature could impart to them."

Cooley on Constitutional Limitations, 3d Ed., page 236, after an exhaustive examination of the decisions of the courts, lays down the rule established to be, "That the government has no power to revoke a grant, even of its own funds, when given to a private person or corporation for special uses."

In *Fletcher vs. Peck, 6 Cranch*, 137, the court say: "A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to re-assert that right."

"In *Wright vs. Hawkins, 28 Texas*, 471, the court say: "The proposition is not maintainable that the Legislature may, as long as the legal title remains in the State, make such disposition of the public domain as it may deem fit, irrespective of the equitable right or titles of individuals."

2 Story on the Constitution, paragraphs 1376-7.

"The Constitution embraces and applies to executed and executory contracts, to express and implied contracts, and a law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contracts, necessaaily impairs it. The same, section 1385, "Contracts and grants made by a state are not less within the reach of the prohibitions, than contracts and grants of private parties." The same, section 1391.

In the case of *Ferret et al. vs. Taylor et al , 9 Cranch, p. 50*, the court say: "If the Legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge

of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such doctrine would uproot the foundation of almost all the land titles in Virginia, and is entirely inconsistent with a great and fundamental principle of a Republican government—the right of the citizens to the free enjoyment of their property legally acquired."

In *Richards vs. Felps*, *6 Wallace*, 165, the court say: "Congress is bound to regard the public treaties, and it had no power to organize a board of revision to modify titles confirmed many years before by the authorized agents of the government." See also,

Dartmouth College vs. Woodward, 4 Wheaton, 694.
Strong vs. Lehmer, 10 Ohio St., 100.
Morton vs. Nebraska, 21 Wallace, 673.
Hubbard vs. Brainard, 35 Conn., 563.
The Bridge Propr's vs. the Hoboken Co., 1 Wallace, 116.

It is a well settled rule that in construing the language of a statute the history of the legislation affecting such statute will always be considered.

City of Burlington vs. Kellar, 18 Iowa, 64.
Yant vs. Brooks, 19 Iowa, 91.

Also in the interpretation of Statutory Laws, the intentions of those making the statute should be ascertained.

Ex parte Pritz, 9 Iowa, 30.
Baker & Griffin vs. Steamboat Milwaukee, 14 Iowa, 214.

The bill which afterwards became the act of April 21, 1876, was introduced in the Senate of the United States January 25, 1876, by Senator Harvey, of Kansas. His remarks on the occasion may be found on pages 605-607, Vol. 4, Part 1, of Congressional Record 1st session 44th Congress.

An examination of his remarks discloses the fact that the bill was based on certain action of the Secretary of the Interior relative to cases arising under the grants to the Missouri, Kansas and Texas Railroad Company, and the St. Joseph and Denver City Railroad Company. The Senator then called attention to the rulings of the Department made upon certain claims under homestead and pre-emption entries allowed within the limits of the grant before withdrawal of the land from market. The Secretary of the Interior "held these filings were made before the withdrawal of the lands, but under the construction now adopted by the department, the right of the railroad attached at the time of the definite location—not as formerly at the time of the withdrawal."

The fourth section of the act under consideration in the cases above referred to by Senator Harvey is as follows:

SEC. 4.—And be it further enacted, "That as soon as the said company shall file with the Secretary of the Interior maps of its line designating the route thereof, it shall be the duty of the Secretary of the Interior to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purpose of this act, and subserve the public interests."

The same language occurs in the Pacific Railroad acts, the act of July 4, 1866, making an additional grant of lands to the State of Minnesota, the act of July 23, 1866, making a grant of lands to the State of Kansas, the act of July 25, 1866, making a grant of lands to the California and Oregon Railroad Company, the act of July 26, 1866, making a grant of lands to the State of Kansas, and in numerous other land grant acts.

As we have seen there are no such provisions in the grant of 1856 to the State, or that of 1864 to the Railroad Campany.

Senator Harvey, in his advocacy of the act of April 21, 1876, kept the line very clearly marked between the two classes of grants.

The grievance which the law was designed to remedy, was the refusal of the Secretary of the Interior to recognize rights which were claimed under homestead and pre-emption settlements made after the passage of the act, before the withdrawal of the lands from market, as required by the said 4th section.

While rights of homestead and pre-emption settlers were recognized which attached before date of the withdrawal of the land from market, but little if any difficulty or conflict occurred as to the right of the claimants under the different laws. "But," says Senator Harvey, "latterly erratic and retro-active rulings have been made, involving, among other absurdities, the idea that the rights of a railroad company could attach to the lands while they were still subject to homestead and pre-emption entries, ignoring the fact that railroad grants require the lands to be withdrawn from market after the railroad companies have filed their maps, and that the order of withdrawal upon all such filing is and must necessarily be the first official segregation of the territory within which the grant becomes operative."

Nothing can be clearer than that this line of argument exempts the acts of May 15, 1856, and June 2, 1864, from the operation of the act of April 21, 1876. Not a single point here relied on can find a resting place in the aforesaid acts, nor in the decision of the department, or of the courts determining the character and

extent of the grants, and the rights of the State and the railroad companies thereunder. There has been no conflict in the decision of the department from the first in 1857 down to the present time, or to the date at which the lands granted by the said acts of May 15, 1856, and June 2, 1864, became vested in the State and Railroad Company. These acts are, as we have shown, different from the acts under which the cases arose which caused the passage of the act of April 21, 1876. Under the former, the title became vested in the State and the Company without the interposition of the Secretary upon acts to be subsequently done by the Company. It was the duty of the Department to reserve the lands for the purpose of the grant immediately upon its passage.

Wolcott vs. Des Moines River Co., 5 Wallace, 688.

Enough has been said to show that there is a wide field in which the act of April 21st, 1876, can operate without touching a single case under the Iowa grants.

The class of cases presented by the foregoing extract from the Congressional Record afford abundant room for its legitimate operation, without resort to the extraordinary and unreasonable construction contended for by defendant.

Leaving the facts connected with the passage of the act, let us now examine more critically the act itself. It is not claimed that the second and third sections have any bearing upon these cases. The first section is the one to which our attention is directed.

The grant under the act of May 15, 1856, attached to the land on the definite fixing of the line of the road. This rule follows the language of the act, and has the

sanction of the Attorney General, the Department, and the Supreme Court of the United States, as hereinbefore shown. The grant under the act of June 2, 1864, attached upon the passage of the act, as the lands passing under it embraced all the vacant lands within its limits.

This is the construction of the act that has been affirmed by the Department and the courts. The first section of the act of April 21, 1876, relates to land whose *status* under the grant could be affected by the date when notice of the withdrawal of the lands from market was received at the local land office of the district in which the lands are situated. This rule cannot apply to the lands of plaintiff, and therefore the act cannot apply to them. And if this were not the case, the facts in relation to the withdrawal of the lands are with the Company. The lands under the grant of May 15, 1856, were at once withdrawn on the passage of the act. Those under the act of June 2, 1864, were withdrawn on the 16th day of June, 1864. No mistake which the department may thereafter have made (and the department admits that its subsequent action was error) could change the rule or result.

Lands which have been sold or otherwise disposed of by the United States cannot be restored to market by order of the General Land Office. The first section of said act of April 21, 1876, refers to land restored to market. That cannot apply to the lands of the Company, any more than it could apply to other lands disposed of by sale or otherwise by the United States.

The said section refers to cases "where the homestead and pre-emption laws have been complied with and proper proofs have been made by the parties having such tracts or parcels."

The laws cannot be complied with by entering upon the lands of another, and proper proofs cannot be made in such cases. Only "unappropriated" lands are subject to homestead and pre-emption claims and entries. There is no element in the act we are considering which can be applied to these cases at bar without a forced and unreasonable construction. The construction contended for by the defendant finds no support either in the legislative intent or the decision of the courts.

The court, in the case of the *B. & M. R. R. Co. vs. Lawson, supra*, construing the act of April 21, 1876, say: "What land grants may be referred to by this act we are unable to determine, nor is it necessary that we should do so. It is enough to say that the act can have no application to lands like those in controversy in this case, where the title had passed from the United States years before the passage of the act under consideration. By the acts of 1856 and 1864 the rights of the Railroad Company did not depend upon the withdrawal of the land, nor upon notice of such withdrawal. When the line of the road was definitely fixed, the lands were not subject to homestead entry, and an enterer could acquire no rights against the grantee under the act."

Judge McCrary, in the case of *Tabrock vs. the B. & M. R. R. Co., 2 McCrary, 407*, speaking in reference to the same act, says: "It does not in my opinion apply to a case where, prior to any such pre-emption or homestead entry, the land had been specially granted by an act of Congress, and had fully vested in the grantee. To give such a construction would be equivalent to saying that Congress intended to take lands from an

owner whose title was perfect and confer them upon another. * * The act of Congress was itself a grant as well as a law, and had all the force of a patent. When the condition (the definite location of the line) was performed the title became absolute."

In *Englie vs. Young, 24 Kansas, 732*, the court say: "Further, we think the reinstatement of the Stainbrook entry, under the provisions of the act of 1876, a mistake of law, as the title of the Railroad Company vested in the particular tract on June 30, 1859, by the route of the road being then definitely fixed. This vested title could not be disturbed by a subsequent act of Congress."

Defendants urge that the modified line, as shown by the map filed in 1865, has never been completed to the Missouri River opposite Missouri Valley, hence the Railroad Company are not entitled to the lands under the grant.

No lands have been certified or claimed for the construction of the part of the line never built. But how, under defendants' theory, could the failure to build from Missouri Valley westward to the River, defeat plaintiffs' claim for lands for the road actually built.

The Department has regarded the two maps as showing the modified line, so the Commissioner informed John I. Blair at the time of the presentation of the maps showing the modified line. (72).

The maps thus filed and the route shown thereby to a connection with the Iowa Branch of the Union Pacific, was what the act of 1864 contemplated, and in the route so designated the grantor has acquiesced.

Besides, the Governor of the State of Iowa, whose duty it is under the acts of Congress, to certify the completion of the several sections of road, to aid in the

building of which the lands were granted, has certified to the length of the road constructed, as fixed by the combined maps, and to its completion upon the line designated by those maps. Upon these certificates the State of Iowa and the Government have acted in all subsequent matters in reference to the execution of the provisions of the grant.

And where the grantor, the trustee under the grant, and the beneficiary thereunder, have acquiesced in the construction given the acts of Congress and State Legislature under which the road was built, a stranger to the grant cannot be heard to question it.

Schulenberg, et al., vs. Harriman, 21 Wallace, 44.
Barrett vs. Brooks, 21 Iowa, 144.
Kitner vs. Story Co., 28 Iowa, 35
C. R. I. & P. R. R. Co. vs. Grinnell, 51 Iowa, 476.

The claim made by defendant that he is a purchaser in good faith, avails him nothing in this case.

It is well settled that in cases arising under conflicting entries or claims to government lands, the doctrine of notice is not recognized.

Arnold vs. Grimes, 2 Iowa, 19.
Bagnel, et al., vs. Brodrich, 13 Peters, 454.

It is uryed that this action must be brought within five years from the time when the cause of action accrued or the same is barred by the statute of limitation.

This action is for the recovery of real property, and under the limitation laws of the State suit may be brought within ten years from the time plaintiffs' right to the title to the land in question became absolute. Section 2529, division 5, Code of 1873, provides that actions brought for the recovery of real property may be brought within ten years from the time the cause of action accrued. Although fraud is alleged in the bill it

is still an action for the recovery of real property and governed by the statute above cited.

In the case of *Williams vs. Allison, 33 Iowa, p. 278*, the court say: "Although actual fraud is charged in this case and the relief prayed for has heretofore been granted in a Court of Chancery, yet the relief sought has been heretofore granted as well in the courts of law as in the Courts of Chancery. It is quite apparent, then, that the cause of action does not fall within the class specified in the the third sub-division above quoted and is not barred by the statute within five years. Upon the whole case we hold that to bar the action by the statute of limitation would require ten years, and as a consequence the action is not barred by the statute."

It is the well settled doctrine that the limitation statutes of the State can only begin to run against the title perfected under the legislation of Congress from the date of its consummation, which in homestead entries is the issuing of the patent.

In *Heinshaw vs. Bissell, 18 Wallace, 270*, the court say, in an action in which the rights of the claimants under two grants arose, "The action of the government thereunder and the rights which perfected title insures to its possessor cannot be impaired or defeated in any respect by the statute of limitations of the State. That statute can only begin to run against the title perfected under the legislation of Congress from the date of its consummation.

Gibson vs. Chouteau, 13 Wall., 92-9.
Simmons vs. Ogle, 105 U. S., 271.
Miller vs. Dunn, 62 Mo., 216.
Gardner vs. Miller, 47 Cal., 570.
Montgomery vs. Bevans, 1 Sawyer, 680.

The Courts will correct the errors committed by the officers of the Land Department.

Courts of equity will look into the proceedings before the Register and Receiver, and even into those of the Land Office, or other offices, where the rights of property of the individual are involved, and correct errors of law or of fact committed to his prejudice.

In *U. S. vs. Stone, 2 Wallace, 535*, the court say: "It is contended here by counsel of the United States that the land for which the patent was granted appellant, was reserved from sale for use of the Government, and consequently that the patent is void. And although no fraud is charged in the bill we have no doubt that such a proceeding in chancery is the proper remedy and that if the allegations of the bill are supported that the decree of the court below canceling the patent should be affirmed. * * * Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, when the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such case courts of law will pronounce them void."

In *Johnson vs. Towsley, 13 Wallace, 85*, the court say: "And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party when in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, a Court of Equity will, in the language of the court, in the case of *Stark vs. Starrs, (6 Wallace, 402)*, convert him into a trustee of the true owner, and compel him to convey the legal title In

numerous cases this has been announced to be the settled doctrine of this court in reference to the action of the land officers" (*Van Wyck vs. Knevals, 106 U. S. 360.*

The position contended for by defendants that a suit in equity to determine and quiet title can only be brought by a party in possession is fully answered by the provisions of the Code of Iowa, 1873, page 526, section 3213: "An action to determine and quiet title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto though not in possession."

The case of *Fremont and Mills Counties vs. The Burlington and Missouri River Railroad Company, 22 Iowa, 91*, was brought by bill in equity to determine the question of title between the claimants under the swamp land grant and the railroad grant of 1856. Neither party was in possession. The court held the action properly brought and granted the relief prayed.

There is no reasonable excuse for defendants' pretended entry of plaintiffs' lands.

The contest as we have seen, is between the plaintiffs claiming title under the grant of 1864, and the holders of patents wrongfully issued for land previously granted.

The fact that the land is within the fifteen mile limits of the original main line is not controverted. The decision of the courts and Land Department construing the land grant of 1864, have been uniform, always holding it a grant *in præsenti*, that it took effect from the passage of the act, upon the odd and even sections within the limits of the grant.

There is no provision in the grant for lands granted, reverting to the United States upon the failure of the Company to construct the road according to the terms of the grant. Under the 8th section of the act the lands granted were to become subject to the control of the Legislature of the State to aid in the completion of the road on the failure of the Company to construct it.

With full knowledge of the grant, for all are presumed to know the law, defendants made their homestead entries. The Air Line survey had been staked and marked off upon the lands near defendants, since 1857. The odd sections were known as railroad lands.

The grant of 1864 gave the even sections also. Where the terms of the grant are so clear as those of 1864, and where the construction given it by the courts and Land Department have been uniform, there seems to be but little excuse for defendants' attempt to homestead or purchase the lands granted to the Company.

Neither is there any foundation in fact for the claim made by defendants that they were induced to make their homestead entries by reason of the failure of the Company to make the lists required by the ruling of the Department. These rules were not approved by the Secretary of the Interior until the 6th day of June, 1866, and not until after that period could the Company have been notified of the request of the Department.

Some of the defendants—Herring, Greenstreet, Brooks and Iddings, made their entries between March 2[illegible], 1865 and June 14, 1865, a year before the promulgation of the rules. Cutter, Lake and Dundon made their entries in August, 1866. None of these could

have been allowed by reason of the lists not having been filed. The principal lists were made August 15, 1866, October 22, 1866, and August 29, 1867, (91), and were approved by the Department July 18, 1868 and April 20, 1869. (42). Until the approval of the lists there could be no presumption that the grant had been satisfied. The rights of the defendants, whatever they had, accrued before this.

Many lands selected were rejected by the Department from all the lists, and before the approval of the lists that had been for nearly two years in the Land Department, the officers of the Department would have no reason to assume that the lands in question would not be needed to make up a full grant under the act of Congress. Nor could the defendants have any reason to so believe. The delays in making selections or in the adjustment of the grant after defendants' right attached, could not have influenced the action of the defendant in taking or the Department in the allowance of the entry. We submit, a fair construction of the testimony leads to the conclusion that defendants saw that the land was desirable, took possession thereof under the theory that railroad companies have few rights that the citizen is bound to respect, and occupied the land for years without the knowledge of the plaintiff; and now, under the pretense of some indefinable equitable right, ask the court to sanction by its decree, the wrong they have perpetrated, and give to them the land granted to the Company long before they claimed the benefit of the donation under the homestead act.

The claims of the respective parties are:

A grant upon the one hand to aid a great work of internal improvement---a donation on the other, under

the homestead act, of land previously granted, and to which the donor had no title at the time of the gift.

The law of the case and the right, we submit, is with the plaintiff, and the decree of the Supreme Court of Iowa should be reversed.

W. L. Joy,
E. S. Bailey,
Attys for Plff's in Error.

110-27

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1139.

THE CEDAR RAPIDS & MISSOURI RIVER RAILROAD COMPANY AND THE IOWA RAILROAD LAND COMPANY,
Plaintiffs in Error.

vs.

ANDERSON JEWELL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF IOWA.

ARGUMENT OF PLAINTIFFS IN ERROR.

W. L. JOY, E. S. BAILEY, Attorneys for Plaintiffs in Error.

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STATEMENT OF THE CASE.

This case involves the title to land claimed by the plaintiffs in error under the same Acts of Congress and under the same circumstances as in the case of *same plaintiff vs. Herring*, and eight other cases. It presents substantially the same questions of law and fact—the same evidence was introduced in this case as in those, and in addition thereto the following facts appear in the record:

1. The certificate of the Commissioner of the General Land Office, of date May 13, 1880, (157), certifying that the lists therein mentioned of lands selected by the plaintiff and aggregating 2,299 acres, are true copies of that portion of the original lists then remaining on file and awaiting final adjustment by that office.

2. The testimony of an agent of the plaintiff, (156), shows that in 1874 and 1875 an examination was made of the tract books, plats and records of the United States Land Office in Iowa, for the purpose of ascertaining what lands remained uncertified, and all the vacant lands remaining were selected, and also all other lands subject to the grants of 1856 and 1864, though covered by adverse claims, such as homestead, pre-emption and swamp claims, originating after June 2, 1864, that the lists of vacant lands were approved, except a small portion and also excepting the lists mentioned in the Commissioner's Certificate before referred to, that the several lists covered by adverse claims, and which aggregated about 38,000 acres (138) were presented to the land officers for approval and they refused to approve the same; that about 36,000 acres of the lands so selected and rejected are involved in this and the other so-called homestead suits pending in Monona, Woodbury and other counties and are all located between the six and fifteen mile limits of the original line.

3. The Iowa Central Air Line Railroad Company, on the 18th day of November, 1859, (157), selected from the lands granted to it the first 120 sections, 76,800 acres. and prior to the resumption act of March 17, 1860, had sold and conveyed to various persons nearly all of the same and the conveyances thereof were recorded in the proper counties. (138.)

4. That of the lands certified under both acts in a suit against the plaintiffs in the Carroll County District Court, Iowa, 6,720 acres had been held to be swamp lands and passed to the State under the Swamp Land Act, and that the same had been erroneously certified under the railroad grant. (159.)

The Supreme Court held (Opinion, p. 223), as in the *Herring case*, the length of constructed road for which six sections per mile was intended to be granted was 271 6-10 miles, that the amount of the grant would be 1629 6-10 square miles or 1,042,944 acres, and there had been certified to the Company 1,144,154 acres; that "in addition thereto the Company had selected and made claim to the balance of the indemnity lands, including the land in question, being about 41,000 acres more;" that the 120 sections—76,800 acres—which went to the original Company—the Iowa Central Air Line—should not be deducted from the amount certified, but the same was a part of the grant to plaintiff; that the deficiency does not much exceed 17,000 acres, and that the plaintiff is not entitled to resort to the lands in suit to supply it.

ASSIGNMENT OF ERRORS.

The plaintiffs in error say that in the record and proceedings in said cause there is manifest error in this, to-wit:

1. The Supreme Court of Iowa erred in its construction of the Act of Congress approved May 15, 1856, entitled "An Act making a grant of lands to the State of Iowa, &c.," and the Act amendatory thereof, approved June 2, 1864, and particularly the 4th section of the same, whereby said Court held and decided that said plaintiffs were entitled under said grants to only six

sections of land per mile of railroad actually constructed, whereas said Court ought to have held and decided that under said Acts of Congress the plaintiffs were entitled for constructing said modified line to the same amount of land as was originally authorized to be granted to aid in the construction of the entire main line of the Iowa Central Air Line Railroad.

2. The Court erred in holding that plaintiffs were not entitled to any lands for constructing the branch railroad between Clinton and Lyons.

3. The Court erred in holding that plaintiffs were not entitled to any lands for constructing the Onawa Branch Railroad—so-called.

4. The Court erred in holding that it devolved on the plaintiffs to show that the lands selected had been disallowed, abandoned or released from the claim made thereto before they would be entitled to recover the lands in suit.

5. The Court erred in so construing the said grants that the plaintiffs' rights under the Act of 1864 were in any manner dependent on selections made or the action taken by the officers of the Land Department thereon, and in holding that plaintiffs' proof of the disposition made of the lands selected did not show a disposition of the same and a denial of the plaintiffs' rights thereto.

6. The Court erred in holding that plaintiffs are not entitled to the lands in suit, while conceding that they have not received all the lands they are entitled to under the grant.

7. The Court erred in holding that under the Homestead Act the said defendant, Anderson Jewell, acquired any interest in the land in suit, and that said land was subject to homestead entry at that time.

8. The Court erred in so construing the said Acts of 1856 and 1864 as to hold that the 120 sections which passed to the Iowa Central Air Line Railroad Company under the Act of 1856 was a part of the land granted to the Cedar Rapids & Missouri River Railroad Company, and constituted a portion of the grant of six sections per mile for road constructed under the Act of June 2, 1864.

9. The Court erred in affirming the judgment of the Court below, dismissing the petition of plaintiffs and holding that they had no right, title or interest in the land in controversy.

ARGUMENT.

All that we have said in the argument of the Herring case with respect to the questions raised by the 1st, 2d, 3d, 4th, 6th and 7th assignments of errors there alleged is applicable to the same assignments of error in this case and to avoid repetition is adopted as a part of the argument here. We shall only discuss the additional questions raised by the 5th and 8th assignments.

I.

As to the 5th error alleged, it will be remembered that the Supreme Court of Iowa held in the *Herring* case that it devolved upon the plaintiffs to show that the lands selected by plaintiff had been disallowed and also that the odd numbered sections had been exhausted, before resort could be had to the lands in suit to supply the deficiency.

While insisting that this ruling was erroneous, the plaintiffs in this case introduced the testimony of Wm. Ragan, who was the plaintiffs' agent from November, 1873 to November, 1878. (136.) During 1874-5 he made

an examination of the tract books, plats and records of the United States Land Office for the purpose of ascertaining what lands remained uncertified under the grants, and as the agent of the plaintiffs in 1876 he selected all the vacant lands within the limits of the grants. Those selections amounted to 9,652 acres, and were afterwards certified to the Company, except about 250 acres.

He also, during the same period, selected in the Des Moines Consolidated District, 24,974 acres and in the Sioux City District 13,492 acres—aggregating 38,466 acres—which were covered by adverse claims under homestead and pre-emption laws, and the swamp land grant. These selections embrace all the lands in litigation in this and the other so-called homestead suits pending in Monona, Woodbury and other counties. These lists covered by adverse claims were presented to the Land Officers and they refused to approve the same and so certified. The lands are situated within the six and fifteen mile limits of the original main line. Between July, 1877 and the latter part of August, 1878, he selected (139) 2,299 acres, which lists were approved by the Register and Receiver, but had not been certified to the Company up to May, 1880. They are lists Nos. 4, 5, 6, and 7, (139-146). and were the only lists then pending before the Land Department awaiting adjustment. Copies of them are in evidence, (151-7), and the Commissioner of the General Land Office certifies, May 13, 1880, that they are true copies of that portion of the original lists then remaining on file and awaiting final adjustment by that office. These lists and the rejected lists embrace substantially all the uncertified lands inuring to the Company under the grants. He says it was

his purpose and aim to embrace in his selections all the lands to which the Company had a valid claim, whether previously selected or not, and which had not been certified by the Secretary. The lands in the rejected lists have all been disallowed to the plaintiffs and so far as the Land Department is concerned, have been disposed of by the United States. Patents have issued for them and as stated by Commissioner Burdette, (72), they are considered *res adjudicata*. It is beyond all controversy that they have passed beyond the jurisdiction of the Land Department and they will not be certified to the Company.

The lands in suit and the selected lands are even numbered sections within the fifteen mile limits of the original main line and of the class which the Secretary was required to reserve, certify and convey to the plaintiff. They have all been erroneously and by mistake allowed to be entered under the homestead and pre-emption laws and all stand upon the same footing. If the objection raised by the Supreme Court constitutes a good defense in this case, it does also as to all the remaining lands of the grant, notwithstanding a large deficiency is found to exist.

II.

In construing the Acts of 1856 and 1864, the Supreme Court held that the 120 sections—76,800 acres which passed to the Iowa Central Air Line Railroad Company, under the former act, was a part of the land granted to the plaintiff and constituted a portion of the six sections per mile for the road constructed under the latter act. In this we think the court erred.

The grant under the latter act was made direct to the Cedar Rapids & Missouri River Railroad Company,

and was of the "same lands and the same amount of lands per mile as originally granted to aid in the construction of its main line," and the Secretary was required to reserve and cause to be certified and conveyed to *said Company* an amount of land equal to that originally authorized to be granted to aid in the construction of that line. Now it seems very clear from this language that it was the intention of Congress to grant to this company at least as much as six sections per mile of constructed road. The Act further declares that the amount so provided for shall be certified and conveyed "out of any public lands *now* belonging to the United States, not sold, reserved or otherwise disposed of," within fifteen miles of the original main line. The description of the lands to be certified and conveyed is specific and certain, that is, "public land" then at the date of the Act—"belonging to the United States, not sold, reserved, or otherwise disposed of," and the only question that can arise with reference to these lands is whether at that time they belonged to the United States and had not been sold or disposed of.

By the 4th section of the act of 1856 (19) it was declared that a quantity of land not exceeding 120 sections might be sold. The General Assembly of Iowa conferred all the lands, rights and interests appropriated to this line upon the Iowa Central Air Line R. R. Co. (20) That Company November 18th, 1859, (157-8) selected from the land grant made to it the first 120 sections inuring to it, all of which had been previously certified to the State. It conveyed nearly all of it to different persons, and the conveyances were put on record in the proper counties before the resumption. It is also shown by the record (159) that the litigation in *C. R. & M. R.*

R. Co. vs. Courtright, 21 Wallace, 310, (*same case 35 Iowa, 386*), and in *Miller vs. C. R & M. R. R. Co. et al. 56 Iowa, 374,* was in reference to the title of a part of these lands, and this Court held that "the purchasers from the Iowa Central Air Line Co of the 120 sections took a good title to the property." The Iowa Supreme Court in both cases held the same way. So that there can be no question whatever but that in law the title to all these lands passed out of the United States and the State of Iowa to the Air Line Co at the date of the legislative act of July 14, 1856, and long before the resumption act was passed. Both courts held that the legislation of Congress and the General Assembly operated to confer upon the first grantee—the Air Line Co. —an absolute and unconditional title to the whole of the first 120 sections. In the face of this unequivocal adjudication there is no foundation for the inference that Congress intended these lands to be a part of the lands granted to this Company by the act of 1864. It is unreasonable to infer that Congress, in the use of the phrase "the same lands," intended to convey lands which it had already, several years before, disposed of, and to which the Government had no shadow or claim of title. "The real intention will always prevail over the literal sense of the terms, and control the strict letter of the law, where the latter would lead to palpable injustice, contradiction and absurdity." The real intention undoubtedly was to include in the grant "of the same lands" all those embraced in the act of 1856, which then belonged to the United States, and which Congress had the right to dispose of, and not lands which it was well known had passed beyond the control of the Government.

It seems to us that it is no answer to this construction to say that there is a distinction between indemnity against a failure of title to lands in place and indemnity against a failure of quantity, and that the latter was intended.

In the first place it is unreasonable to suppose that Congress intended to grant land which it had long before absolutely disposed of; and secondly, it did grant, specifically and directly, to this company "an amount of land equal to that originally authorized to be granted," which, the Court say, is six sections per mile of constructed road. If there is any question of indemnity involved in this clause of the grant—which we deny—it is that after exhausting all the available lands of the original grant, then the deficiency should be made up out of the even sections in the fifteen mile limits. But this act operated alike upon all the public lands within fifteen miles of the original main line, for the Secretary was required to certify to this company, out of any public lands then belonging to the United States within fifteen miles of that line, the prescribed quantity. No distinction whatever is found in the statute between odd and even numbered sections, nor between the lands embraced in the act of 1856 and those added by the act of 1864. Both classes stand in the same category, and there is no authority for the Secretary to make any discrimination between them in his certifications and conveyances.

The act provides that if the authorized amount shall not be found within the limits of the fifteen miles, then selections may be made along the modified line within 20 miles thereof. These are the only indemnity or lieu lands recognized by the act, but they are not involved in this discussion.

The decision of the Supreme Court of Iowa upon this point can only be sustained upon the theory that Congress intended to grant to this Company lands already granted to another, and that that portion of the act which requires the Secretary to certify to this Company the prescribed quantity of land out of public lands belonging to the United States can be properly and lawfully complied with by certifying to the Company private lands not belonging to the United States.

If it should happen, in any case, that lands are certified or embraced in the lists which are not of the character embraced by the act of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, are perfectly null and void (*U. S. Rev. St , Sec. 2449*).

If we are right in these views, the 76,800 acres are not properly chargeable to the plaintiffs, but should be added to the deficiency found by the Court. The Court evidently considered that the Des Moines River lands—109,756 acres—did not belong to the grant; nor the 6,720 acres of land in Carroll county, which the District Court of that county held were swamp lands, and passed to the State under the swamp land grant of Sept. 28, 1850 (159), and hence should be deducted from the amount certified.

The total certification under both acts, according to the testimony of Mr. VanDeventer (80) is 1,143,154 acres.

Deducting Des Moines River lands, - - - - -	109,756	
Mistaken certification (81), -	1,000	
Air Line Co. lands, -	76,800	
Carroll county swamp lands,	6,720	
Making a total of - - - - -		194,276 acres.

Leaves, which the Company has received, 948,878 acres.

If, therefore, the Company is entitled, as the Court held, to only 1,042,944 acres, there is a deficiency of 94,066 acres.

If it is entitled to lands for the Lyons Plug and the Onawa branch, or either, or to the same amount of lands as originally granted to aid in the construction of the main line, as we claim in this, as well as in the *Herring* case, then the deficiency is much larger.

III.

There is no reasonable excuse for the defendant's pretended entry of this land.

He made the entry in February, 1865. At that time no lists of selections had been made under the Act of 1864, nor had the Department requested the Company to make them. He was informed that the adjoining tract of land—an odd numbered section—was railroad land, so that he must have known that it was within the Air Line limits, and being presumed to know that the Act granted the even sections within the same limits, he is chargable with constructive if not actual notice that these lands were covered by the terms of the grant.

No lands were certified till 1868. Hence he could not have then presumed that the Company had received lands enough, nor that the grant had been fully administered.

We respectfully submit that the judgment of the Supreme Court of Iowa should be reversed.

W. L. Joy,
E. S. Bailey,
Attys for Plff's in Error.

110-2

OFFICE SUPREME COURT U. S.
FILED
NOV 17 1883
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

(Nos. 142 to 150, inclusive, and 1139.)

THE CEDAR RAPIDS AND MISSOURI RIVER RAILROAD COMPANY AND THE IOWA RAILROAD LAND COMPANY,
Plaintiffs in Error,

vs.

BENJAMIN HERRING, and nine other Cases, by the same Plaintiffs in Error; one against each of the following Defendants in Error: John T. Lake, Lewis Iddings, Daniel T. Cuttler, Patrick Dundon, Elijah W. Brooks, David Greenstreet, Catherine M. Wooster, William T. Boyd and Anderson Jewell.

In Error to Iowa Supreme Court.

Argument for Defendants in Error.

JOHN S. MONK,

For Defendants in Error.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
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In Error to Iowa Supreme Court.

Argument for Defendants in Error.

STATEMENT OF FACTS.

These suits were begun in the State District Court of Monona County, Iowa, in January, 1877. The relief sought is to compel a surrender of the legal title to the lands in controversy from the defendants, who hold by patent direct from the Government. At or near the same time, were brought, by the same plaintiffs, against different settlers in Monona, and other counties in Western Iowa, about four hundred other suits, in all of which similar relief is asked and substantially the same questions involved. The ten cases for decision here, having been selected as test cases, are understood to fairly represent all the others,

which are still pending in the State District Court, awaiting the result of these. Nine of these ten, Nos. 142 to 150, inclusive, were determined in favor of the defendants by the District Court, June 13, 1878, and by the Supreme Court of the State, December 19, 1879, and the record brought to this court at the October Term, 1880. In the other case, No. 1,139, a decree in favor of the defendant was entered September 23, 1881, by the District Court, and affirmed by the Supreme Court of Iowa, June 23, 1883. The record in the last-mentioned case having been brought here and filed at the present term, it has been advanced on the docket and set for hearing with the other nine.

All the testimony in Nos. 142 to 150 was introduced in No. 1,139, with some additional testimony. Wherever in this brief, testimony contained in both records is referred to, the reference will be to the first, only.

The alleged equity of the plaintiff is founded upon certain acts of Congress and of the Iowa Legislature, making grants of land to aid in the construction of a certain railroad in that State. None of the lands in dispute are specifically granted by either of said acts. But it is claimed that at the date of the amendatory act of Congress of June 2, 1864, there were not, within the prescribed limits, sufficient vacant lands to fill the grant of quantity made by said act. Hence, the plaintiffs insist, the grant immediately attached to all the vacant lands within those limits. The defendants, on the other hand, insist (1) that, exclusive of all lands on which there are conflicting claims, the plaintiffs have already received more land than they are entitled to; (2) that, even if the grant has not, and cannot be filled, it did not attach to any even section, nor to any part thereof, until the same was selected and

reserved, as required by the act, and that their rights accrued before such selection or reservation; (3) that, if the grant did attach to these lands before the rights of defendants accrued, the plaintiffs, by acquiescence in the action of the department, and by knowingly standing by and seeing the Government dispose of them as its own, and the defendants purchase and improve them, under a belief of ownership, without objection, and without making known their claim, are estopped from asserting title thereto. The facts relied on to support the last defense will be given as part of the history of the plaintiffs' claim, in connection with the acts of the plaintiffs and of the department relative to the adjustment of the grant.

FACTS REGARDING THE TITLE OF DEFENDANTS.

Most of the patents assailed are based upon homestead entry. The following table exhibits the date of entry of the tracts occupied by each of these ten defendants, and the date of each patent:

Name of Defendant.	*Date of Entry.*	*Date of Patent.*
Anderson Jewell	February 6, 1865	July 7, 1871.
David Greenstreet	March 20, 1865	January 15, 1872.
Benjamin Herring	May 31, 1865	April 1, 1872.
Elijah W. Brooks	May 31, 1865	July 1, 1871.
Lewis Iddings	June 12, 1865	January 15, 1873.
Daniel T. Cuttler	August 13, 1866	January 15, 1873.
John T. Lake	August 17, 1866	April 10, 1874.
William T. Boyd	June 4, 1868	January 15, 1873.
Catherine M. Wooster		May 16, 1870.

The last-mentioned tract was taken as a homestead, July 2, 1867, by Q. A. Wooster, who, on October 5, 1869, entered the land for cash, in the name of his wife, Catherine M. Wooster.

The entry of Lewis Iddings was made between the date of the order of withdrawal, June 7, 1865, and that of the order of restoration, July 6, 1866, but before the

reception of the former at the local land office, at which time, according to its terms, it was to take effect.

William T. Boyd availed himself of the privilege accorded to soldiers, of proving up before the expiration of five years from the date of entry, and for that reason obtained his patent in less than the usual time after entry.

Before hearing of any adverse claims to their lands, the defendants had made improvements, consisting of breaking, building, setting out fruit and forest trees, etc., on the tracts held by them respectively, valued as follows:

John T. Lake, $500; Daniel T. Cuttler, $1,000; David Greenstreet, $1,000; Patrick Dundon, $1,040; Lewis Iddings, $960; Catherine M. Wooster, $1,600; Anderson Jewell, $1,600; Benjamin Herring, $1,680; Elijah W. Brooks, $1,680 to $1,760; William T. Boyd, $2,000.

For most of the parties in Monona County Holbrook & Bro. acted as agents in forwarding their applications to enter homesteads to the local land officers, from whom they received certificates of entry and delivered them to the parties. They received, from time to time, from the Register and Receiver at Council Bluffs, lists of lands subject to homestead and pre-emption entry, and gave to parties applying to them for information such information as they received from the local land officers.

From 1869 to 1870 the same firm also represented the railroad company (plaintiff), in the sale of its lands in Monona County, where most of the lands in dispute are situated. Prior to that time, and as early as 1866, they acted for the railroad company, in the sale of certificates, giving purchasers a prior right to buy railroad lands of the company when they should be put in market. B. D. Holbrook, one of the firm, testifies that, prior to 1874, he

never heard of any claim by the company to any of the lands in suit, or to any others similarly situated.

Jewell's application was forwarded to the local land office by B. D. Holbrook, by whom he was informed, at the time, that the land was subject to homestead entry, and from whom he obtained, about the same time, a certificate giving him a right to buy certain railroad land, located upon an *odd* section, when it should come into market, and which he afterwards did purchase through said Holbrook. Jewell first heard of the railroad company's claim to the land homesteaded, which is on an *even* section, about a month before suit was brought against him.

Q. A. Wooster was shown by the Register at Council Bluffs what purported to be official plats, which he examined, in 1865 and again in 1867, and found nothing to lead him to suspect any adverse claim to the land. He was assured by both Register and Receiver that it was subject to entry. Both entries were made in good faith; the last one being in the name of his wife, and for which he paid the Receiver $200.

Each of the defendants made his entry in good faith and in ignorance of any adverse claim. Each was informed at the time that the land was vacant and subject to entry, either by the local officers or by the parties employed to forward his application, and neither of them ever heard to the contrary until about the time suit was brought against him. Each has been in possession ever since the date of his entry, and has strictly complied with the law and regulations of the Land Department.

HISTORY OF PLAINTIFF'S CLAIM.

The amount of land involved in all of the suits similar to these is 36,291 acres. It is all situated within fifteen

(part of it within six) miles of the original line contemplated by the act of May 15, 1856, and *north* of the *twenty*-mile limit of the *modified* line authorized by the amendatory act of June 2, 1864. All but about 1,200 acres are located upon *even* sections.

The *even* sections, with which alone we have to do, are claimed by the plaintiffs under the amendatory act of June 2, 1864. It will be necessary, however, in order to obtain a clear understanding of this claim, to look not only to that act, but also to other acts, both State and national, which lead up to and explain it, as well as to the course of action of the plaintiffs and of the department relative to the adjustment of the grants made by these acts.

For the purpose of aiding in the construction of four lines of railroad across the State of Iowa, Congress, by act of May 15, 1856, made a grant of land to said State. One of these railroads was to extend from Lyons, on the Mississippi River, northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad near Magnoketa; thence, on said main line, running as near as practicable to the 42d parallel of latitude, across the State of Iowa to the Missouri River. The grant was of every *odd* section within six miles on each side of said road, with a right to select indemnity lands, subject to the approval of the Secretary of the Interior, from odd sections within fifteen miles on each side thereof, in lieu of odd sections within the six-mile limits granted as aforesaid, which had been sold or disposed of prior to the location of the routes.

Section 4 of said act provides as follows:

"And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in the manner following: that is to say, that a quantity of land not exceeding 120 sections for each of said roads.

and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed 120 sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of said roads, may be sold, and so from time to time until said roads are completed."

By an act of the General Assembly of Iowa, passed July 14th, 1856, this grant was accepted; and by the same act, the lands intended to aid the line from Lyons were conferred upon the Iowa Central Air Line Railroad Company; which company, having accepted the grant, located the line of its road, passed the lands in controversy in March, 1857.

September 4th, 1856, Bernhardt Henn, as agent of the State of Iowa, selected all the vacant *odd* sections between the sixth and fifteen-mile limits of each of said roads, in lieu of those previously disposed of within the six-mile limits; and in December, 1858, these selections were approved, and the land selected, together with those in place, amounting to $665{,}960\frac{96}{100}$ acres, certified to the State. In April, 1863, the so-called Des Moines River lands were certified, making in all $775{,}717\frac{81}{100}$ acres in odd sections, certified prior to the passage of the act under which these lands are claimed.

The Iowa Air Line Company, "having utterly failed to construct any part of said road as required by law," all rights previously conferred upon them were, by act of March 17, 1860, resumed by the State.

Subsequent to the grant to the Air Line Company, and prior to the act resuming it, another company, the Chicago, Iowa and Nebraska Railroad Company, without any land grant or other aid, had constructed a railroad from *Clinton*, a point on the Mississippi a few miles

below Lyons, the proposed eastern terminus of the Air Line road, to Cedar Rapids, a point eighty-one miles west of the Mississippi. In the meantime the plaintiffs had organized for the purpose of constructing a road from Cedar Rapids west, and on the 26th day of March, 1860, the General Assembly of Iowa granted the lands resumed from the Air Line Company to the plaintiffs, to aid the construction of their line from Marion, a point six miles northeast of Cedar Rapids, to the Missouri River. All the lands granted to aid the line from Lyons across the State were appropriated to the construction of the line from Marion west, or, practically, from Cedar Rapids west, since no road has ever been built by plaintiffs between Marion and Cedar Rapids. The plaintiffs were required, however, to build, in addition to the main line for which the grant was made, a road from Lyons to Clinton, a distance of two and $\frac{41}{100}$ miles, to connect with the Chicago, Iowa and Nebraska Railroad.

As appears from the foregoing, it had, before the grant to plaintiffs, been already ascertained that the vacant *odd* sections within the original granted and indemnity limits, which alone were subject to the grant, were insufficient to give *six* or even *four* sections per mile for the distance from Marion west, much less for the longer line contemplated by the grant from Congress to the State. The lands, both within the granted and indemnity limits, had all been certified to the State, and the precise amount ascertained; the deficiency was apparent. Iu view of this deficiency, known to all parties, the act of he General Assembly conferring the grant upon plaintiffs provided as follows:

SEC. 4. "It is hereby further provided, that said Cedar Rapids and Missouri River Railroad Company shall be entitled to the full amount of land authorized by said act of Congress, as the work progresses, for the first

three sections of road, of twenty miles each, which shall be constructed by said company; but thereafter, as the work progresses, they shall be entitled to an equal *pro rata* apportionment of the land remaining subject to appropriation in aid of this work, to be ascertained by a division of the quantity of lands so remaining by the number of whole sections of twenty miles each, extending from the point of construction then reached to the Missouri River."

Section 5 is in the words following:

SEC. 5. "It is further expressly provided, that this act shall not be so construed as to give title to any portion of said lands to the company accepting the provisions hereof, otherwise than as the work progresses, and as provided in the act of Congress aforesaid, conferring the lands upon the State of Iowa, namely: When they shall have completed each section of twenty miles of road aforesaid, they shall be entitled to the amount of land apportioned thereto, and not before; and they shall not become entitled to the first one hundred and twenty sections authorized by act of Congress, until such first section of their road shall have been completed, at which time they shall become entitled to the first apportionment of land. Nor shall this act be so construed as in any manner to prevent the General Assembly of this State from resuming, upon failure of either of the conditions named in the second section of this act, all lands to which the said company shall not have then become entitled by completion of one or more sections, as aforesaid, of said road."

The plaintiffs accepted this grant. Under it, they began the construction of their road, and, prior to the passage of the amendatory act of Congress of June 2, 1864, had completed one hundred miles, from Cedar Rapids to Nevada. They had, therefore, become entitled to land as provided for by said act of the General Assembly, under and in pursuance of which the work was done; that is to say, they had become entitled for the first sixty miles to six sections per mile, and for the next forty miles to the *pro rata* apportionment provided for by section 4, above quoted.

June 2, 1864, the amendatory act of Congress was approved.

Section 4 of this act authorized the plaintiffs to *modify* or change the *uncompleted portion* of their line, so as to secure a better and more expeditious line to the Missouri River, and *to a connection* with the Iowa branch of the

Union Pacific Railroad. And, "for the purpose of facili-
"tating the more immediate construction of a line of rail-
"road across the State of Iowa, to connect with said Iowa
"branch," it authorized them to connect their line by a branch with the line of the Mississippi and Missouri Railroad Company; which latter company was authorized by section 1 of this act to modify or change the location of the uncompleted portion of *its* line *for connection* with the said Iowa branch. Section 4 then proceeds as follows:

"And the said Cedar Rapids and Missouri River Railroad Company shall be entitled *for such modified line*, to the same lands and to the same amount of lands *per mile*, and for such connecting branch, the same amount of land *per mile* as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant; and, for the same purpose, right of way through the public lands of the United States is hereby granted to said company. *And it is further provided*, That whenever said modified main line shall have been established, or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing such modified line and such connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of land *per mile* granted or intended to be granted by the original act, to aid in the construction of said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof: *Provided, however*, That such new located or modified line shall pass through or near Boonsboro', in Boone County, and intersect the Boyer River not further south than a point at or near Dennison, in Crawford County: *And provided, further*, That in case the main line shall be so changed or modified as not to reach the Missouri River at or near the forty-second parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri River, to construct a branch road to some point in Monona County, in or at Onawa City; and to aid in the construction of such branch the same amount of lands per mile are hereby granted as for the main line, and the same shall be reserved

and certified in the same manner; said lands to be selected from any of the unappropriated lands, as hereinbefore described, within twenty miles of said main line and branch; and said company shall file with the Secretary of the Interior a map of the location of the said branch." * * * (*Record in No. 142 pp. 23 and 24.*)

Section 8 is as follows:

SEC. 8. "*And be it further enacted*, That no lands hereby granted shall be certified to either of said companies until the Governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof as aforesaid of the completion of the additional sections of the road as aforesaid; and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the Legislature of the State of Iowa, to aid in the completion of such road." (*Record in No. 142, p. 25.*)

FACTS RELATIVE TO THE LOCATION AND LENGTH OF THE MODIFIED LINE AND AMOUNT OF ROAD CONSTRUCTED.

Under date of July 5, 1865, the plaintiffs, by their agent, Mr. Steiger, transmitted to the Secretary of the Interior a "map, duly authenticated, of the amended "route of said road, from Cedar Rapids to the Missouri "River," which map they asked leave "to place on file "*as the basis* of the adjustment of the additional grant of "2d of June, 1864."

This map was filed in the department July 11, 1865. It indicates a line of railroad from Cedar Rapids to a point on the Missouri River, nearly opposite Missouri Valley, and about eighteen miles north of the point on the bank of the river opposite Omaha, now claimed to be the western terminus of the amended route. A certificate indorsed on said map, authenticated by the vice-president and secretary of plaintiffs, recites that on June 19, 1865, it was adopted by said company as a map of its

general route from Cedar Rapids to the Missouri River, by a resolution of its board of directors, set out in said certificate.

The Sioux City and Pacific Railroad is *a connection* with the Iowa branch of the Union Pacific, connecting with it at Fremont, and crossing the Missouri River at a point about where the western terminus of the modified line was located June 19, 1865. As located four days before the location of the modified line, it was to cross the river exactly at that point.

No road west of Missouri Valley, on the line adopted by the board of directors, was ever built. December 19, 1867, Mr. Blair transmitted to the department his so-called "map of the western terminus," indicating a line from Missouri Valley to the bank of the Missouri River, opposite Omaha. It is not an extension of the line delineated on the first map, but a new line radiating therefrom at nearly a right angle, seven miles from the terminus of the former on the river. Mr. Blair requested that his "map of the western terminus" be attached to the map of definite location heretofore filed; but, according to Acting Commissioner Lippencott, Mr. Blair's request was not complied with, nor his map officially filed. (*Record in No. 142, p. 91.*)

No part of either of the branches authorized by the act of June 2, 1854, nor any road east of Cedar Rapids, except the Lyons plug, which is two and 41-100ths miles in length, was ever built by plaintiffs. The line constructed from Cedar Rapids to the bank of the Missouri River, opposite Omaha, is two hundred and seventy-one and 6-10 miles. From Nevada to the same point is one hundred and seventy-one and 6-10 miles, and from Missouri Valley to the same is twenty-four miles. July 2,

1867, the Governor of Iowa certified to completion of road and that it was 271.6 miles in length.

FACTS RELATIVE TO THE ADJUSTMENT OF THE GRANT.

June 16, 1864, at the request of the Iowa delegation in Congress, all the public lands in the State were withdrawn from entry, "with a view to facilitate the adjustment of the several grants of land recently made by Congress to said State." (*Record in No. 142, p. 107.*)

The next act of the department relative to the grant, was the order of August 25, 1864. This order, though seemingly expressed in tolerably plain English, was, it is alleged, "erroneously construed by the local officers to authorize the allowance" of these entries. It is in the words following:

GENERAL LAND OFFICE, August 25, 1864.

Register and Receiver, Des Moines, Iowa:

GENTLEMEN—In pursuance of instructions from the Hon. Secretary of the Interior, under date of the 24th inst., the order of the 16th of June last, withdrawing from sale the public lands in Iowa, is modified so that entries may be made under the homestead and pre-emption laws as before that order was issued, and you will allow such entries to be made accordingly.

JOS. S. WILSON,
Acting Commissioner.

A similar letter sent to Council Bluffs. (*Record in No. 142, p. 108.*)

And, December 8, 1864, instructions were issued to the local officers as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 8, 1864.

Register Land Office, Council Bluffs, Ia.:

SIR—In reply to your letter of the 23d ult. I have to state that selections of public lands by railroad companies, under act June, 1864, of the *even* numbered or *indemnity* sections within the limits of the several roads provided for in said act, will take effect from the time of filing such selections in the local land office. The odd numbered sections in the limits of the several roads inure to the State or companies from date of survey in the field of the line of road.

JOS. S. WILSON,
Acting Commissioner.
(*Same Record, p. 109.*)

It is nowhere asserted that these instructions were "erroneously construed" by the local officers, nor have the learned counsel enlightened us as to what, in their opinion, is a proper construction of them. In view of their complaints against the local officers for persistently misconstruing and acting in defiance of the orders of the department, the reticence of the learned counsel upon this point is to be regretted.

June 7, 1865, the lands were again withdrawn from homestead and pre-emption entry. This order seems to have emanated from the commissioner, without authority from the Secretary of the Interior, and contrary to his directions. The instructions of the latter, issued five days before, certainly did not warrant any such order. In these instructions the secretary wholly ignores the complaints and demands of the railroad company and the suggestions of the commissioner relative thereto, and directs the latter to comply with the recommendations of Hubbard and the local officers. These recommendations were not that any lands be withdrawn from homestead and pre-emption entry, but that all of them, except the odd sections, be restored to general entry. Instead of pursuing these instructions of his superior, the commissioner issues this order prohibiting entries of any kind within the limits of the grant. (See letters from Hubbard, Walker and Stieger, and correspondence between the secretary and commissioner, pages 109 to 113, and order of June 7, 1865, page 113 Record in No. 142 to 150.)

All subsequent acts of the department treat this order as a nullity. The lands embraced therein are referred to in the order of restoration "as lands heretofore withheld from ordinary private entry." They are referred to in the order suspending their restoration to market for a

year, as lands to be held "as heretofore, subject to preemption only." None of the entries in question having been allowed while the order of June 7, 1865, was in force, its validity, or invalidity, is important only as bearing upon the consistency of departmental action.

June 6, 1866, instructions to supersede those of November and December, 1864, relative to the location of grants from Congress for railroad and other purposes, were issued to the local offices. Neither these instructions nor the law upon which they were based could have any application to any grant except for indemnity and other grants for quantity. Lands specifically granted to railroad companies are located by the location of the route, with which the local officers have nothing to do. Such instructions were as follows:

1. "Under this law the registers and receivers each are entitled to receive $1 fee for each final location of 160 acres, or any quantity approximate thereto, when deficit is less than 40 acres.

2. "When the several quantities shall have been definitely ascertained by you to inure to the grant, as hereinafter prescribed, the fees will be due.

3. "The State, through its grantee, or the grantee, as the case may be, is required to file with the register and receiver descriptive lists of the tracts of land claimed as inuring under the grant, within section of . . . . . miles each, along the line of route on both sides thereof, to be dated and verified by the signature of selecting agents, or agent's certificate to be attached to each list, see form 'A.' The party appearing as the agent of the grantee must file with the register and receiver written and satisfactory evidence, under seal, showing authority to act. In preparation of lists register and receiver will afford agent all reasonable facilities, taking care not to interrupt current public business. The lists must be carefully examined by the register and receiver; their accuracy tested by the plats and records of the office; when so examined and tested and found correct in all respects to be a final location, and you will on payment of the fee so certify at foot of each list, according to form 'B.'

"After lists have been examined and your certificate attached, same will be consecutively numbered from No. 1, for each railroad or separate grant. Upon payment of fees and certification of lists the register will post selections in tract-book, after following manner: 'Company, act ——, list No. ——,' and on the plats he will mark the selected tracts 'R. R.'

"After selections are posted and marked, the lists will be transmitted to this office with the evidence of agent's appointment."

4. "The fees will be due in all cases where the service may be rendered subsequent to act of 1864," etc. (*Record in No. 14, pp. 87 and 88.*)

Among other things which the local officers are required by form "B" to certify, was that there was "no "homestead, pre-emption, State or any other valid claim "to any portion of said land on file or of record in this "office." The certificates prescribed for the agents recognize the lands selected as *public* lands, and recited that the lands *are* vacant, unappropriated, etc.

In pursuance of these instructions the Cedar Rapids & Mo. R. R. R. Co. (plaintiffs) appointed agents in the four land districts through which the road runs, to make selections of the land claimed by them under the act of June 2, 1864, and selections were made by such agents, at the times and in the amounts hereinafter stated.

The following notice and order explain themselves:

NOTICE. No. 711.

For restoring to market certain lands heretofore withheld from ordinary private entry, for the adjustment of railroad grants in the State of Iowa:

Notice is hereby given, that public lands which have heretofore been withheld from ordinary private entry for the adjustment of railroad grants in the State of Iowa, to the aggregate quantity of 641,410.15 acres, held at the double minimum price of $2.50 per acre, and 1,627,014.46 acres held at the ordinary minimum of $1.25, will be restored to market as follows, viz:

On Monday, the 17th day of September, 1866, at the Land Office at Fort Des Moines, 1,772.41 acres at $2.50 per acre, and 12,385.91 acres at $1.25 per acre.

On Monday, the 1st day of October, 1866, at the Land Office at Council Bluffs, 18,821.43 acres at $2.50 per acre, and 2,365.98 acres at $1.25 per acre.

On Monday, the 15th day of October, 1866, at the Land Office at Fort Dodge, 102,907.99 acres at $2.50 per acre, and 145,906.62 acres at $1.25 per acre.

On Monday, the 29th day of October, 1866, at the Land Office at Sioux City, 517,928.32 acres at $2.50 per acre, and 1,466,355.95 acres at $1.25 per acre.

Lists descriptive of the above lands by legal subdivisions will be retained in the respective land offices above mentioned for the inspection of parties wishing to purchase.

Given under my hand at the City of Washington, the 5th day of July, 1866.

[SEAL.] J. M. EDMUNDS,
Commissioner of General Land Office.
(Record in No. 142, p. 116.)

DEPARTMENT OF INTERIOR,
GENERAL LAND OFFICE,
July 6, 1866.

GENTLEMEN—I herewith enclose two descriptive lists of lands in your district, heretofore withheld from ordinary private entry for the adjustment of land grants to the State of Iowa for railroad purposes. The one list embracing 18,821.43 acres, held at the double minimum price of $2.50 per acre, the other 236,598 at the ordinary minimum of $1.25.

I also enclose herewith a copy of notice No. 711, of yesterday's date, under which these lands will again become subject to ordinary private entry on Monday, the 1st day of October, 1866, and the lands similarly situated in the other districts of the State at the dates therein specified.

You will retain said lists in your office, open to the inspection of parties desiring to purchase. The enclosed notice you will cause to be published immediately in some newspaper of general circulation in your district, the publication to be continued at least once a week until the 29th of October next, the latest date fixed in the notice for the lands in any of the districts to be restored to market.

Printed copies of the notice will be transmitted to you in a few days for distribution.

J. M. EDMUNDS,
Commissioner.
(Same Record, p. 117.)

The descriptive lists enclosed with this order and notice embraced all the lands affected by this litigation, which had not been entered prior to that time; or, in other words, *all the vacant lands within the original fifteen-mile limits, north* of the twenty-mile limits of the modified line.

An examination of the maps will disclose that the compromise fifteen-mile limits between the plaintiffs' road and the one on the south of it, under the act of 1856, became the compromise twenty-mile limit of the modified line between these roads under the act of 1864. Only on

the north do the new limits extend beyond the old, and not there, except at points where little, if any, land appears to have been found subject to the grant. The limits of the modified line do not, however, include all the original limits. The modified line, toward its western terminus, turning abruptly in a southwesterly direction, leaves a considerable tract within the fifteen-mile limits of the original line, outside of, and north of the twenty-mile limits of the modified line. Here are situated the lands concerned in this litigation. These, or such of them as had not been previously entered, and a large quantity besides, similarly situated, were restored to general entry.

The act of June 2, 1864, it will be remembered, required the lands within the original limits to be first exhausted; but all, or practically all, the lands subject to the grant, within the twenty-mile limits of the modified line, being also within the compromise fifteen-mile limits of the original line, there could, in fact, be no order of precedence. Those within the twenty-mile limits of the modified line were subject to appropriation under the grant equally with those north of them. But, being nearer the constructed road, they were more valuable. And it was probably for this reason that they were withheld from entry for the adjustment of the grant, while those north of the twenty-mile limits of the modified line were restored to market. It should be borne in mind, that, at the date of this order, the Des Moines River lands were treated by both the officers of the Government, and the plaintiffs, as a part of this grant, and that the only map of the modified line then on file, indicated a line only about two hundred and fifty miles in length. So the lands

within the twenty-mile limits were amply sufficient to satisfy the claims of the company at that time.

August 15, 1866, the railroad company, plaintiff, made their selections of even or indemnity sections claimed under the act of June 2, 1864, in the Council Bluffs district, which then included Monona County. The list, aggregating 139,565 acres, embraced only land situated within the twenty-mile limits of the modified line; the company thus conforming its action, in selecting, to that of the Department, in restoring, lands; the former selecting only from lands south, and the latter restoring those north, of the twenty-mile line.

The letter of August 23, 1866, is quoted by plaintiffs as proof that the Department, at that time, held these lands exempt from entry. It directs the local officers, at Sioux City, not to allow homestead and pre-emption entries upon even sections within the five, fifteen and twenty-mile limits of the Cedar Rapids *Railroad*, whilst all the lands designated in the *list* of vacant lands were to remain subject to such entries. Counsel overlook the statement of Burdette, that in the *list* mentioned were lands outside the amended or twenty-mile limit of the *road*, but within the original limits. This is in exact conformity to the order of restoration, and to the action of plaintiffs, in making their selections in the Council Bluffs district. While none of the even sections were specifically granted, the department, though not obliged to do so, had the undoubted right, even before selection, to withhold from market for a reasonable time, an ample quantity to await the adjustment of the grant, and allow entries only on the remaining lands, and that is the policy it did pursue. The order of September 20, 1866, was issued in pursuance of the same

policy. So far as the even sections are concerned, it refers only to the twenty-mile limits of each *road*.

(*Pp. 117 and 118 in No. 142.*)

September 21, 1866, the order restoring to market lands north of the twenty-mile line was suspended for one year from July 5, 1866, and the local officers directed to hold such lands as "*heretofore, subject to pre-emption and homestead settlement only.*"

(*Record, No. 142, p. 118.*)

October 22, 1866, a month subsequent to the suspension of the order of restoration, the selections in the Sioux City district, amounting to 191,483 acres, were made. Of this amount, 125,649 acres were lands north of the twenty-mile line, which, but for the order of suspension, would have been offered within seven days of the date of this selection.

(*Record, in No. 142, pp. 62, 90 and 119.*)

August 29, 1867, the selections were completed, so far as the lands then claimed were concerned. There had been certified under the original act, and were then held by the State for the use of the plaintiffs, 775,717.81 acres in odd sections. Add to these 377,397 acres of even or indemnity sections, under the act of June 2, 1864, selected up to August 29, 1867, equals 1,153,114.81 acres; deducting from this amount 109,756 acres, Des Moines River land lost to the grant, leaves 1,043,358 acres; or, 414 acres more than enough to give six sections per mile for the 271.6 miles of road from Cedar Rapids to Omaha. The excess of 414 acres is probably due to the fact that the grant is for sections, which might easily overrun to that extent.

(*Record in No. 142, pp. 40 and 90.*)

For nearly five years after August 29, 1867, no selections were made. Those made in 1866, in the Council Bluffs and Sioux City districts, were acted upon July 18, 1868, and all of them except 4,282 acres approved.

March 18, 1869, the railroad company, plaintiff, filed in the Woodbury District Court their petition against Woodbury County *et al.*, in which petition they admit, or rather allege, among other things, the following: That under instructions issued by the Commissioner of the General Land Office, May 30, 1866, and approved by the Acting Secretary of the Interior, they were required to appoint agents to select the land claimed by them in the several land districts of Iowa, under the act of June 2, 1864; and that, in accordance with said instructions, agents had been appointed to make such selections. And, after stating the amount selected in each district, and the amount in the Council Bluffs and Sioux City districts, certified to them July 18, 1868, by the Department, the petitioners aver, upon information, that the amount of lands certified as aforesaid, include *all* the lands in these two districts, which the Secretary of the Interior would or *ought* to certify to them; and that no definite action had been taken on the selections in the other two districts. Final action was had on the Fort Dodge and Des Moines lists April 20, 1869, and of these selections 15,684.97 acres were approved, and the balance, 26,314.03 acres rejected.

Immediately after this action of the Department, Mr. Steiger, by an arrangement with the company, took up the original lists of selections "with a view to examine and revise the whole grant." Finding, he says, that quite a number of vacant tracts, enuring to the road, in all the four land districts had been omitted, he at once prepared

lists of such lands for each district, *including all the lands now in dispute.* No details are given respecting any of the lists, except that for the Council Bluffs district. On this list was noted the adverse entries previously made, with the words "considered invalid" written opposite the names of Herring, Cuttler and other locators. The abstract from this list, attached to Steiger's depositions as Exhibit "F," is very meager, but the map attached thereto, also marked Exhibit "F," shows that all the lands in the Monona County suits were included in said list, and Steiger so testifies.

Neither this list, nor any of the others prepared by Mr. Steiger in 1869, was ever filed in the Department or either of the local land offices.

In June, 1869, Mr. Steiger says his relations to the company were so changed as to interrupt further proceedings on his part as to selections, until May, 1870. He then took up the old lists again, and learning — between May and September of that year — that all the vacant lands, in even sections, north of the twenty-mile line, including the lands in controversy, had been restored to market in 1867, he erased them from his list; those which were then vacant, as well as those then covered by entries adverse to the grant. He also made a memorandum on said list, a copy of which appears on the abstract thereof attached to his testimony. Considering the facility with which Mr. Steiger afterward swears that "the lands in "controversy north of the twenty-mile limits, in Monona "County, were *persistently* claimed by the company and "its agents, both before and after the fact was known to "them that they were *inadvertently* restored to market in "1867;" "that *they* lost no time in asserting their claims;" and "that the delays which did occur were attributable to

delays of official executive action," and that the restoration of these lands was "simply a mistake of the clerks" who prepared the lists; considering this testimony of Mr. Steiger, we say the language of the memorandum, prepared by him in 1870, sounds a trifle odd, to say the least. Here it is:

"OCTOBER 22, 1870.

"After preparing the above list I found that the great body of the above lands were restored to market by Public Notice 711, issued in 1866, but postponed until 1867, by order of Secretary (see Commissioner's letter), to wit: lands outside of twenty-mile limit, but within old granted limits. I propose to respect homestead and other entries outside of twenty miles, but not within, and select all within twenty miles (contesting homestead), and no selections North of twenty-mile limits which the office holds are not granted, and have restored to market. All others struck out from the above. (*Record in No. 142, p. 122.*)

The following letter, written some time before this memorandum was made by Mr. Steiger, shows the correctness of his information regarding the position of the Department at that time:

"GENERAL LAND OFFICE,
December 6, 1869.

"*J. H. Morris, Onawa City, Iowa:*

"In reply to yours of 22nd ult., respecting homestead entry by C. K. Conde, for S. E. ¼ 34, 83, 35, I state that upon examination, said tract is found outside of the northern twenty-mile limits set apart by the act of 2nd of June, 1864, for the amended line of the C. R. and Mo. R. R., and therefore said entry is proper and legal, so far as shown by the records of this office.

"JOS. WILSON,
"*Commissioner.*"

(*Record in No. 1,139, pp. 216, 217.*)

The tract here mentioned, the maps will show, is inside the original fifteen-mile limits, and is probably involved in this litigation, being situated similarly to the rest.

As soon as practicable, Mr. Steiger says, he put the new lists in form. The amount embraced in the lists for

districts other than the Council Bluffs district, the date of filing, or the fate that awaited them, does not appear. The Council Bluffs list, aggregating $11,924\frac{26}{100}$ acres, seems to be given as a sample. Mr. Steiger succeeded in getting it into form and filed at the local office, March 18, 1882. With such rapidity did he progress in revising the original lists of selections, "securing the land from adverse claims," and adjusting the grant, that at the end of a year and a half he had resolved on the course to pursue, and where to begin; he had decided to respect the entries of these defendants, and to look elsewhere for satisfaction of the claims made under the grant. Five months later, he had obtained from the company the certificate of authority which the regulations required to be filed with the local officers by all selecting agents. At the expiration of another year, his first list reached the local office. In the meantime most of the land embraced therein had been disposed of, and of the 11,924 acres selected, only 960 were approved. With like diligence and like results, lists were prepared, forwarded and filed in July, 1872, in November and December, 1874, in November and December, 1875, and in March, 1876.

The reasons for his action assigned by Mr. Steiger, in his testimony, are neither reasonable in themselves nor consistent with the memorandum made by him at the time. He now says, that in preparing his new lists, he "considered it would be useless to select any of the lands "north of the twenty-mile line until the error of their res- "toration could be inquired into and corrected." If, however, Mr. Steiger is aware of any method by which the alleged error could be corrected, except by selecting some of the land restored and getting the Department

to act on such selection, it is to be regretted that he has failed to point it out."

No effort of any kind to correct the alleged error appears to have been made until 1874; no offer to select the land still vacant within the restored limits; not even a complaint to the Department for keeping them open to settlement, and allowing the entries already made to ripen into titles by continued residence, improvements, payment of the required fees, and the issuance of patents to the occupants. As soon, however, as all the lands were disposed of by the Government, and brought to the requisite state of cultivation and improvement, an inquiry into the alleged "error" of their restoration was begun. At first only a few isolated tracts, covered by recent entries of settlers, too remote from each other for concerted action, were selected, and proceedings begun in the Department to cancel such entries, none of the entries thus assailed having been made earlier than 1873. These proceedings terminated November 16, 1875, by a decision of Secretary Delano, in each case awarding the land to the railroad company.

Emboldened by these victories, and armed with these precedents, he resolved to bring on a general engagement. It was now considered, says Mr. Steiger, "the proper "time to bring all the claims of this character (to lands "north of the twenty-mile line) regularly before the "Department for final action." Accordingly, on the 13th of December, 1875, he transmitted to Iowa a complete list of such lands for selection to the local office; the same lands which, on a former occasion, he struck out of his list, and avowed his purpose not to meddle with; the same lands to which he then recognized the just rights of these

defendants, and proposed, like an honest man, to *respect* them.

With a celerity habitual to them, the company contrived to get this list to the local office by March 16, 1876, where it was filed on that day. Such tracts as were still vacant and unoccupied were certified by the *local* officers as subject to selection. The balance, covered by entries of from one to twelve years' standing, were struck out and disallowed. This action of the local officers was sustained by the Department, and resulted in the present litigation, which was begun in January, 1877.

Since the act of June 2, 1864, there have been certified to the plaintiffs, under that act, 359,097.56 acres and 8,612 acres in odd sections, under the act of 1856, making, with the 775,444 acres previously certified, 784,056 acres under the original act; and, under both acts, 1,143,153 acres, less 109,757 Des Moines River lands, equals 1,133,396 acres. Of this amount, 11,220 acres have been certified since the date of the Burdette and Lippencott pamphlets, which are by stipulation made competent evidence of the facts recited. There are now pending in the Department selections amounting to 2,229 acres, which have been certified by the local officers as vacant and subject to selection; and of the lands in dispute, there are about 1,200 acres of odd sections. As to 21,000 acres of these lands, the adverse claims were initiated between June 2, 1864, and April 1, 1869. As to 10,700 acres the adverse claims were initiated between April 5, 1869, and March 18, 1872, and the adverse claims to 5,200 acres were initiated between March, 1872, and March, 1876. The list of vacant lands enclosed with the order of November 11, 1867 (being a copy, to take the place of the list of July 6, 1866, accompanying the order of restoration,

which list was destroyed by fire), contains no lands entered prior to July 6, 1866. From this list, it appears that 19,000 acres of the lands in controversy, located in the Council Bluffs district, were vacant at the time of Street's selections of 1866 in that district.

The evidence affords no means of arriving at the amount of vacant lands within either the original or amended limits on June 2, 1864, or at the date of the entries as stated, because,

First—There is no evidence as to the nature of the claims with which the selections rejected by the Department conflicted, nor as to when or how they originated.

Second—Selections by the State, in satisfaction of the grant for agricultural colleges and other grants, were allowed within both the original and amended limits, both before and after the lands were restored to market. (*Commissioner's letters of June 16, 1864, and September 21, 1866, 107 and 118 Record in No. 142.*)

Steiger says that the local officers, as a rule, struck out of the lists of 1866 all lands covered by adverse entries. Plaintiffs must have known this at the time. In settlement of fees of local officers for final locations, if in no other way, they must have learned what tracts were stricken out. They were certainly none of the lands in controversy, for none of these were ever selected prior to 1876. No appeals were even taken from the action of the local officers in striking out of the lists land covered by adverse entries, nor any complaint made to the Department concerning such action.

The list of selections of 1866, as well as those subsequent thereto, being all filed at the local offices, and made up from the tract and plat books there kept, plaintiffs could not fail, whenever they attempted to make selec-

tions, to notice all prior entries. It would be impossible to ascertain what lands were vacant, either at the date of selection or of the grant, without discovering such entries, and, through them, the fact that the lands were being kept open for settlement.

Prior to the original selections of 1866, plaintiffs frequently complained to the Department, of the allowance of entries within the limits of the grant. Having secured all the lands then claimed, their complaints ceased, and likewise all efforts to prevent such entries.

No lands have been reserved nor certified by the Secretary of the Interior until after they were selected by the company; and since 1866, at least, the company has had no reason to suppose and has not, in fact, supposed, that any land would be certified until such selection; or that there was any way to secure lands from adverse claims, except by including them in lists of selection filed at the local office.

ARGUMENT.

I.

Are any of these lands needed to satisfy the grant?

Upon this branch of the case two questions arise.

1. To what amount of lands are the company entitled under the grant?

2. With what amount of land ought they to be charged, as having received? The dispute here is not in regard to the total quantity certified, but as to certain lands which the company claim should be deducted from that total on account of failure of title.

(1) As to the first question the defendants insist,

(*a*) That the plaintiffs are entitled to no lands for either the so-called "Onawa Branch" or the Lyons plug.

(*b*) That the amount of lands they are to receive is determined by the number of miles of road actually built by them, and not by the length of the original line on which no road was ever constructed; nor, by the length of the line across the State, via Clinton, eighty-two miles of which was completed before the grant was conferred upon plaintiff, and by another company, the Chicago, Iowa and Nebraska, without aid of any kind or the hope thereof.

(*c*) 1. That the additional grant, by the act of June 2, 1864, is for the modified line only, which *begins* at the point of construction reached at the date of that act. That, for the 100 miles of road constructed prior to that date, they are only entitled to lands as prescribed by the act of the Iowa Legislature conferring the grant upon them; and which gave, for the first sixty miles, six sections per mile, and for the next forty miles, a *pro rata* apportionment of the remaining lands then subject to appropria-

tion; which lands were confined to the *odd* sections originally granted.

2. And further, that the modified line *ends* at the point on the Missouri River designated by the first location.

(*d*) That, by the original act there was neither granted, nor intended to be granted, six sections per mile. That the grant by that act was only of the vacant odd sections within the six-mile limits at the date of the act; and that the indemnity given, was for lands sold between the date of the act and the location of the route, and not for land sold prior to the grant. This proposition, though its maintenance is not at all necessary to the defense, is believed to be sound, and is advanced because, if sustained, it will, of itself, settle the entire controversy.

(a.) *Plaintiff's entitled to no land for either the so-called "Onawa Branch" or the Lyons plug.*

1. Unless a piece of road, six miles in length, connecting the main line, at Missouri Valley, with the Sioux City and Pacific, at California Junction, a point in *Harrison* County, some thirty miles from Onawa, is a branch road, to some point in *Monona* County, in or at Onawa, then the so-called "Onawa Branch" is just no Onawa Branch at all.

It is shown by the evidence to be a part of the Sioux City and Pacific for which there was a separate grant, made by a public act, of which the court will take judicial notice.

More absurd, if possible, than the attempt to palm off this piece of road as the "Onawa Branch" contemplated by the act, is the pretense of an agreement with the State that it should be so considered. The stipulation of the parties makes the Burdette pamphlet competent evi-

dence of the facts therein recited and of nothing else. That pamphlet recites, not that there was such an agreement, but that plaintiffs "claimed" that there was. Admirable evidence this, isn't it now? They first make an assertion, and then prove it by adducing the fact that they had told somebody else so. That there was anything in this "claim" more than a mere pretense to impose upon the department it is preposterous to suppose. There is no evidence of such agreement, and, of course, none ever existed.

Furthermore, the act required the company to "file with the Secretary of the Interior a map of the location of said branch." The map being necessary to enable the Secretary to determine what amount of land to *reserve*, it was impossible for him to take action until it was filed, nor does the act require him to do so. And, before they can call upon a court of equity to assume the functions of that officer on the ground that he has neglected his duty, in not conveying lands for this branch, it must appear that they furnished him with the certificate of the Governor that it, or some part of it, had been built. This preliminary seems to have been overlooked. Besides, the lands in dispute were never subject to the grant for this branch, which authorized selections therefor only within twenty miles of the main line and branch. Finally, no lands are claimed for it in the petition, all of the lands in dispute being claimed for the modified line.

2. Next, in regard to the Lyons plug. Though requiring this piece of road to be built, and that, until its completion; no lands should be certified for the main line west of Cedar Rapids, the act of the Legislature conferring the grant upon plaintiff appropriated no lands for the Lyons plug. On the contrary it distinctly appropriated

all the lands then subject to the grant to the main line, from Cedar Rapids to the Missouri River. It prescribed the amount for the first sixty miles west of that point, and then apportioned the remaining lands, *pro rata*, to each twenty-mile division from the point of construction then reached to the Missouri River. The grant by the amendatory act of Congress of June 2, 1864, is for the modified line only. That act contemplates, though it does not expressly require, the construction of the Lyons plug. Until the Governor shall certify to its completion according to the laws of Iowa, the Secretary of the Interior is directed to reserve, out of the lands granted for the modified line, a quantity sufficient, in the opinion of the Governor, for the construction of the plug, but no lands are granted therefor.

(*b*) *Plaintiff only entitled to draw lands according to number of miles actually constructed by themselves, and not for road built from Clinton to Cedar Rapids by the Chicago, Iowa & Nebraska, nor for original line from Lyons, never constructed at all.*

It has already appeared, that, subsequent to the grant by the State to the Air Line company, and prior to the acts of the Legislature resuming the grant and conferring it upon plaintiffs, another company, the Chicago, Iowa & Nebraska, without any land grant or other aid, had constructed a railroad from Clinton, a point on the Mississippi a few miles below Lyons, to Cedar Rapids; that, plaintiffs' main line, in aid of which the State conferred the grant upon them, extends from the latter point, to the Missouri River, and is eighty-four miles shorter than the original line from Lyons, to aid which the grant had been made to the State; that, in addition to their main line, plaintiffs were required to build a road (2 and $\frac{41}{100}$ miles in

length) from Lyons to Clinton, connecting there with the Chicago, Iowa & Nebraska. It remains to be added, that the line of the latter company from Clinton to Cedar Rapids, and that of plaintiffs' from Cedar Rapids to the Missouri River, both leased to the Chicago & Northwestern, are operated as one continuous line from Clinton to the Missouri; and that, in close connection therewith, the line from Clinton to Lyons is operated by the same lessees.

It is claimed that, by this arrangement, the State receives practically the same benefit as though the line originally contemplated had been built. It is also claimed that, in connection with the provision for the Lyons plug, the amendatory act of Congress recognized the Chicago, Iowa & Nebraska as a part, not of plaintiffs' main line, but of a main line which, upon the completion of their road, would be continuous across the State. These considerations are relied on to influence the construction of the amendatory act; under which, plaintiffs seem to be in doubt, whether to claim six sections per mile for the whole length of the original line, or, what would amount to about the same thing, six sections per mile for the entire distance across the State on the line via Clinton, including a distance of some eighty-two miles from Clinton to Cedar Rapids, over which no road was ever required to be built by them, or ever was in fact built by them or by any other company connected with any of the grants in question.

The object of the above-mentioned proviso, regarding the Lyons plug, is manifest. Without it, the amendatory act would have simply ratified the law of the State requiring that no land should be certified for the main line until after the completion of this so-called branch. Plaintiffs had been enjoined from building this piece of road, and

the injunction suit was pending long after the date of this act. (*Record in No. 142, p. 86.*) To relieve them from this embarrassment, the proviso directs that, instead of withholding all the lands, until the State law is complied with, only a sufficient quantity shall be reserved to secure such compliance. This was the sole object of the proviso. In its consideration and adoption Congress had regard to that object and to that alone. Hence all of its expressions should be understood as directed to that end, and not as intended to designate what was, or what was not, a portion of plaintiffs' main line; a purpose wholly foreign to that with a view to which it was framed.

Again, the State law, a compliance with which is here required, recognizes the line from Clinton to the Missouri River as comprising two separate roads. It requires the construction of a "railroad"—not a branch—from Lyons to a point of intersection, not "with the main line," but with the "Chicago, Iowa & Nebraska Railroad," at Clinton, and that plaintiffs operate, or cause to be operated, the same, in close connection with that road. And, on the supposition, evidently, that the two roads would be under different management, plaintiffs are required to conform their time tables, passenger and freight rates, etc., to those of the Chicago, Iowa and Nebraska Railroad.

That, as a matter of fact, the road built from Clinton to Cedar Rapids by the Chicago, Iowa & Nebraska is entirely separate and distinct from that of plaintiffs', is unquestioned. In compliance with the act, the Governor of Iowa certified to the Secretary of the Interior the completion of the Lyons plug. His certificate, produced by the plaintiffs, recites the construction of a "railroad" from Lyons to a point of intersection with the "Chicago, Iowa & Nebraska railroad" at Clinton, and that the same is

operated by lessees of the Chicago, Iowa & Nebraska. It further appears from the maps of location filed in the Department, as well as from the depositions of Presidents Blair and Vandeventer, and all the other evidence in the record, that plaintiffs never located, or constructed, or had, or claimed, any line east of Cedar Rapids, and that the whole of their main line, as claimed by them, is $271\frac{6}{10}$ miles in length. The *fact* is clear and unquestioned. The amount of the grant being made, by the terms of the act, to depend upon the actual number of miles they were required to, and did construct, what Congress may or may not have supposed, in regard to the fact, is, therefore, wholly immaterial.

Nor is it of any consequence what benefit the State derives from the present arrangement. The State would, doubtless, receive the same benefit as now, if, instead of building to Cedar Rapids, the Chicago, Iowa & Nebraska had built clear through to the Missouri River. But what occasion then could there have been for a land grant? And that company having built, without any grant, or the promise of any, a considerable portion of the line, why should plaintiffs receive, on that account, an increased quantity, per mile, for the remaining portion?

One of the declared objects of the amendatory act was to enable the company "to secure a better and more "expeditious line to the Missouri River, and to a connec-"tion with the Iowa branch of the Union Pacific Railroad." For that purpose it was authorized to "modify or change the uncompleted portion of its line." Another object, evidently, was to ratify, in part, the action of the Iowa Legislature. In conferring the grant upon this company, for a shorter and different line from that for which it had been received from Congress, the State departed from the

terms of the trust, and gave an imperfect title to its grantee, which title the amendatory act confirms. For this purpose it is declared that the company shall be entitled, "for such modified line," to the "*same lands*," as well as "*to the same amount of lands per mile*," as originally granted for its main line.

It is further to be considered, in this connection, that there was not granted, or intended to be granted, by the original act, six sections per mile for the entire length of the original line therein contemplated. At the date of this act most of the lands along the eastern end of the line had been disposed of. For the first one hundred miles there was not even one vacant odd section per mile within the granted and indemnity limits; while along the western portion, fifteen vacant odd sections could be found within the same limits. These facts were notorious at the time, and must have been known to Congress, and especially to the friends of the bill. Yet the act confines the amount of lands for each twenty-mile division of completed road to a quantity "*not to exceed* one hundred and twenty sections" to be "included within a continuous length of twenty miles." The deficiency in one "continuous length of twenty miles" is not allowed to be supplied from the surplus in another. Clearly Congress must have intended that much less than six sections per mile should pass under the grant made by that act.

It is perhaps unnecessary to repeat that the grant by the original act was of *odd* sections only; that it was a grant of *every odd* section for six sections in width on each side of said road with the right to indemnity, from *odd* sections within fifteen miles, in lieu of odd sections, in place, disposed of prior to the location of the route; that, in the year 1858, the indemnity sections, together with those in

place, were certified to the State, and the precise amount ascertained; and that when, on March 26, 1860, the grant was conferred upon, and accepted by plaintiffs, it was known to all parties that there were not even four sections per mile for the shortened line they were required to construct.

Under a fair and natural interpretation of the amendatory act, they would receive an amount equal in value to the cost of building and constructing their entire line, and more than one and a half times the quantity they agreed with the State to build it for, and in consideration of which, knowing the precise amount then subject to the grant, they constructed, prior to the date of the amendatory act, one hundred miles of their road, and were pushing it rapidly to completion at that time. Hence, if it were permissible to resort to extraneous circumstances for the purpose of extending the grant beyond the plain import of its terms, no valid argument could be founded upon any assumed obligation of the Government, nor upon any assumption that Congress deemed it necessary to give the larger amount to insure the completion of the road.

But no such liberty is permitted. The intent of the act must be gathered from its words, and those words are to be strictly construed against the company. In all cases involving the construction of Congressional grants, to doubt is to be resolved, all doubts being resolved in favor of the Government and against the grantee. Nothing passes but what is conveyed in language so clear as not to be misunderstood. The rule is too familar to require a citation of the numerous authorities in its support. The reason of it is thus stated by this court in *Railroad Co.* v. *Litchfield*, 23 How. 56:

"The reason of the rule is obvious. Parties seeking grants for private purposes usually draw the bills making them. If they do not make the language

sufficiently clear and explicit to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

By the amendatory act, authority is given the railroad company, plaintiff, to "modify or change the uncompleted portion of its line," and also to connect its line with another road, by a branch which has never been built. Then follows the granting clause, in these words:

"And the said Cedar Rapids and Missouri River Railroad Company shall be entitled, for such modified line, to the same lands, and to the same amount of lands per mile, and for such connecting branch the same amount of lands per mile as originally granted to aid in the construction of its main line."

Nothing can be plainer than this language. They are to be "entitled for such modified line" to the same amount of lands per mile "as was originally granted for the main line." What amount of lands per mile was originally granted for the main line? Six sections per mile, say the plaintiffs. Then they are to be entitled "for such modified line" to six sections per mile, are they not?

An effort has been made, and may be again, to attach a different meaning to this clause by means of what is facetiously styled transposition; a process, consisting in the transposition of some of the terms, the interpolation of some, and the suppression of others.

In the construction of statutes a resort to transposition is permitted only where the words, as arranged in the text, are ambiguous or obscure. Addition and substraction are not to be tolerated under any circumstances. Here, the language, as it stands, is clear and explicit. Even transposition, omitting the suppressing and interpolating features of the process, cannot change or impair the plain, manifest sense of the words as used in the act.

By no sort of manipulation or jugglery can they be tortured or twisted into any other meaning.

Moreover, it will be observed that precisely the same expression is used to denote the *amount* of land granted for the modified line, as for the connecting branch. The company is to be entitled, "for such modified line, to the same lands and the same amount of lands per mile, and for such connecting branch the same amount of land per mile as originally granted" for the main line. Had it not been deemed necessary or desirable to confirm the title to "the same lands," this clause would doubtless have read: "For such modified line and such connecting branch the same amount of lands per mile as originally granted," etc. So far as the *amount* of land granted is concerned, this form of expression differs from that used only in being more concise. The sense is not varied.

It follows that if Congress intended to grant, for the modified line, an amount of land equal, in the aggregate, to that originally authorized for the original line, then it also intended to grant a like amount, in addition, for the connecting branch, which was to be only thirty miles in length. In other words, Congress intended to grant for the connecting branch, not six, but sixty sections per mile. If plaintiffs are not prepared to admit this as a legitimate result of their reasoning, let it be explained why different meaning should be attached to the words "per mile" when applied to the connecting branch, than when applied to the modified line; why the same expression, occurring in the same sentence, having the same context and connection, should have different interpretations, because applied to different lines of road. Is it because the method of transposition, addition and sub-

traction is proper when the words of the grant relate to one line, but not when they apply to the other?

Another clause of the act on which plaintiffs seem to place great reliance, is the one relating to the manner of administering the grant. It is as follows:

"*And it is further provided*, That whenever said modified main line shall have been established, or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing such modified line and such connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States, or from the State of Io va, within fifteen miles of the the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of land per mile granted, or intended to be granted by the original act, to aid in the construction of said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof."

Counsel seem to regard this as the only part of the act worthy of much attention. The reason is not far to seek. It is the only clause containing a reference to the quantity of land to be conveyed which omits the significant words "per mile."

It is first to be considered that this provision relates solely to the execution of the grant; to a specification of what lands, "out of which" the grant is to be satisfied, and of the time and manner of reserving, certifying and conveying the same to the company. If, therefore, as to the *amount* of land which the company is to receive, this, and the granting clause, are repugnant, the latter will control, on the principle that where one part of a statute treats specially of a matter, it will control, as to that matter, over other portions in which only incidental reference

is made thereto. But they are not repugnant. Even in this passage, towards the close, the words "per mile" are used in a connection which renders the sense unmistakable. If the amount of land, "per mile," granted by the original act shall not be found within the original fifteen-mile limits, *then such selections* are to be made along the modified line.

To explain the omission of the words "per mile" from the first branch of this clause, and to bring the whole into harmony with the granting clause and other parts of the act, it is only necessary to bear in mind that the lands are to be certified in equal installments; that the amount appropriated to each twenty-mile division is to be certified on the completion of that division. It, then, becomes manifest that the words "from time to time" have the same meaning as in the original act; that is, that they mean, upon the completion of each twenty-mile division; and that the "amount of land equal to that originally authorized" here required to be conveyed, "from time to time," as the work progresses, is the amount originally authorized for a twenty-mile division of road, to wit: One hundred and twenty sections of land on the completion of every twenty-mile division of road; or, six sections for each mile constructed on the modified line. This requirement that the lands for each twenty-mile division shall be certified on the completion of that division runs through all the acts, State and national, relating to the grant.

In the eighth section of this act, it is declared that no lands shall be certified thereunder until the completion of a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; "but that the number of sections per mile originally

authorized" shall be certified upon "the completion of the additional sections of the road as aforesaid." And in the fourth section of the act, to which this is an amendment, it is provided that upon the completion of twenty miles of road, a quantity of land not exceeding one hundred and twenty sections may be sold; and so "from time to time" until said road is completed. It is also provided by the fifth section of the Iowa statute conferring the grant upon plaintiffs, that "whenever they "shall have completed each section of twenty miles of road "as aforesaid, they shall be entitled to the land apportioned "thereto, and not before." Considered in the light of these provisions, it is clear that by the words "from time to time as the work progresses," is meant "upon the completion of each twenty-mile section of road;" and that by the words "an amount of land equal to that originally authorized" is meant the amount authorized for such twenty-mile section of road, to wit, one hundred and twenty sections of land or six sections per mile of constructed road.

That this is the true meaning further appears from the fact that the "amount of lands equal to that originally authorized" here required to be conveyed "from time to time," include those for the connecting branch as well as those for the modified line.

It will be observed that the modified line and the connecting branch are coupled together in the granting clause, then, in the one relating to the location of the lines and the filing of the maps, and again, in this clause, relating to the execution of the grant.

First, it is provided that the company shall be entitled "for such modified line to the same lands and the same amount of lands per mile" and for such connecting branch

the same amount of land per mile as originally granted for the main line. Then follows the requirement that "whenever said modified line shall have been established or such connecting line located" the said company shall file a map "definitely showing such modified line and such connecting branch." The Secretary of the Interior is then directed to convey "from time to time, as the work progresses on the main line, an amount of land equal to that originally authorized" from within the original limits, as above mentioned, without specifying whether such lands are for the modified line, or for the connecting branch, or both; and if the amount of lands per mile granted for the main line by the original act cannot be found within the original limits, then such selections are to be made along the *modified line and connecting branch*, within twenty miles thereof.

Furthermore, the lands for the connecting branch, are to be conveyed, after the completion thereof, and as the work progresses on the main line, that is to say: one-third of the lands for the connecting branch upon the completion of a section of twenty miles of the main line west of Nevada; another third upon the completion of an additional section of twenty miles along the main line; and the remaining third, when another twenty mile section, making in all sixty miles, are completed on the main line, west of Nevada. In short the expressions, "an amount of lands equal to that originally authorized," and "originally granted or intended to be granted," are, in every respect, just as applicable to the connecting branch as to the modified line, and manifestly apply to both. And when it is further considered, that no where else in the act, is there any provision as to where the lands for the connecting branch are to be obtained, there is no room for

doubt upon this point. Upon the completion of each twenty-mile division, the lands for that division, to wit: One hundred and twenty sections, together with the amount due for the connecting branch is to be conveyed, and so on, "from time to time" until the road is completed.

Though the provisions of the original act, that the lands apportioned to each twenty-mile section of road, shall enure on completion of such twenty mile section and not before, is continued in force by the amendment, it is no longer required that such lands be included within a continuous length of twenty miles. The removal of this restriction is not express, but implied, and has no bearing whatever upon the present question. Nor has the retention, by the amendment, of the old limits, throughout the entire length of the original line. These phases of the amendatory act would exist though no additional land had been thereby granted, for without them the company could not hold all the odd sections originally granted, the title to which is expressly confirmed; nor could the company otherwise have obtained six sections per mile of road completed on the modified line.

Assuming that, under the amendatory act, the plaintiffs are entitled to *all* the lands originally granted, it by no means follows that they are entitled "to *an amount of lands* equal to that originally authorized to be granted" for the main line, or to any amount beyond six sections per mile for the modified line. All the lands originally granted, and an amount of land equal to that originally authorized to be granted, considered as an aggregate, are two totally different things, having no sort of relation to each other.

No even sections were granted by the original act, and the vacant odd sections, thereby granted, were not sufficient to yield six, nor even four, sections per mile of the *shorter line* the amendatory act required to be built. The State having undertaken to devote the odd sections granted for the longer line to the shorter one, it was competent for Congress simply to ratify this act of the State, and thereby to confirm the title to the odd sections; or, to fill the grant, to the intended quantity per mile, of road constructed on the modified line. Plaintiffs seem to imagine it to have been naturally or legally impossible for Congress to stop here. Congress, they think, was bound, if it did this much for them, to go further and fill the grant to the amount originally intended for the whole of the original line. There is, however, no such limitation on the power of Congress, nor is there any rule of construction which forbids that, in the expression "to the same lands and the same amount of lands per mile," the words "per mile" may be held to qualify the words "the same amount of lands," and not to qualify the words "the same lands," when such is the evident intention of Congress.

There can be no doubt as to what was the most reasonable and proper thing for Congress to do, nor as to what it has done. It has said that the plaintiff shall be entitled "for such modified line" "to the same lands" originally granted. These are the odd sections previously certified. It has further said that they shall be entitled for "such modified line" to the "same amount of land per mile" as originally granted for the main line; that is, enough even sections to make up, with the "same lands," or odd sections, six sections per mile, "for such modified line."

(*c*) *Additional grant, by amendatory act, is for modified line, or that portion of plaintiffs' line which was uncompleted at the date of the act. For the then completed portion, lands enured only at rate prescribed by prior acts. Modified line begins at Nevada, and ends at point designated by first location.*

Having ascertained the amount of lands "per mile" granted for tbe modified line, it is next to be inquired where that line begins and ends, and what is its length. This, it will appear, resolves itself into two questions: (1) Does the modified line include that part of plaintiffs' road constructed prior to the date of the amendatory act? (2) Does that act require the modified line to be constructed to its present western terminus? Or, in other words, would the conditions of the grant have been satisfied by the completion of a road to the point on the Missouri River designated as the western terminus by the first location?

Under the grant to plaintiffs by act of the Iowa Legislature, approved March 26, 1860, they were to receive, for the first three twenty-mile sections of road, *six sections* per mile, and thereafter a *pro rata* apportionment of the lands then remaining subject to appropriation. This would allow about 3⅔ sections per mile for the last forty, of the one hundred miles constructed prior to June 2, 1864; or about ninety sections less that would enure for the whole line if the additional grant, by the act approved on that day, is limited to road thereafter constructed, than if it is not so limited. That grant is in terms applicable to the modified line, and to that line only. The question then is, where does the modified line begin?

The construction adopted by the Department, at or about the date of the act, appears from the following letter of Commissioner Edmunds to John I. Blair, and is here submitted for what it is worth:

GENERAL LAND OFFICE,
February 23, 1865.

Messrs. J. I. Blair and Oakes Ames:

Your communication of the 16th inst. is received, referring to your previous application for certain certified lists of lands along the completed portion of the C. R. & Mo. R. R. R. and to our reply of the 24th ult. You ask a review of our opinion as expressed in the letter of 24th, calling attention to the provisions of the act of June 2, 1864, especially to its 4th and 8th sections.

The 4th section of said act authorizes the C. R. & Mo. R. R. R. Co. to modify or change the uncompleted portion of its line, and to connect the same by a branch with the main line of the Mississippi & Mo. R. R. R. Co. That section provides further, that when said modified main line shall have been established, or such connecting line located, the C. R. & Mo. R. R. R. Co. shall file in the General Land Office a map definitely showing such modified line and such connecting branch; and directs that the Secretary of the Interior shall reserve and cause to be certified and conveyed a certain amount of lands to the company from time to time as the work progresses on the main line, etc.

The above section does not, in the judgment of this office, authorize the conveyance by certified lists of lands along the completed portion of said road, but only along the uncompleted part of the same, whenever the company shall file the maps required by said section.

The 8th section of the aforesaid act provides that no lands shall be certified to either of the companies mentioned in the law, until the Governor of Iowa shall certify to the Secretary of the Interior that said company has completed, ready for the rolling stock, within one year from the 1st of July next, a section of not less than twenty miles from the present terminus of the completed portion of said road, and in each year thereafter an additional section of twenty miles.

When the company shall comply with these provisions of the statute, and furnish the proofs therein required, it will be entitled to the number of sections per mile originally granted by the act of May 15, 1856.

So far as the act of June 2, 1864, deals with companies, its provisions are prospective, requiring no action by this office, until certain conditions precedent are complied with by the companies, this office, as indicated, finding nothing in the act requiring the department to certify the lists of lands along the completed portion of said road, which have heretofore been certified to the State in aid of its construction.

J. M. EDMUNDS,
Commissioner.

Authority is given to the company to modify or change the uncompleted portion of its line, and it is to be entitled "for such modified line" to the same amount of lands per mile as was originally granted for the main line. The modified line is thus, in terms, defined in the act itself. It is the line to be newly located, changed or modified; the then uncompleted portion of its (the company's) line, and that portion only. It is a line which at the date of the act remained to be "established," not in part, but as a whole; and when established, a map thereof was to be filed in the department. Surely, a line so described was not meant to include a hundred miles of completed road.

In another clause of the fourth section the modified line is defined with still greater certainty and precision, the expression there being this: "that such new located or modified line shall pass through or near Boonsboro'." Here, it will be observed the words "new located line" are used as exactly synonymous with the words "modified line." Is the one hundred miles of road already built a part of "such new located line?" If not, then, how can it be said to be a part of said "modified line?"

Again, if the additional grant was to act retrospectively, why is there not some provision for the conveyance of additional land for road already built? The act, though full and explicit as to the mode of executing the grant, not only fails so to provide, but expressly forbids such conveyance. The Secretary of the Interior is directed, by section four, to certify and convey the lands enuring under the grant, "from time to time as the work progresses on the main line." A comparison of these words with similar passages of this and other acts relating to the grant, has shown that what is here meant, is a conveyance

of one hundred and twenty sections of land upon the completion of each twenty miles of road. How the Secretary is to certify, in that manner, additional lands, apportioned to twenty-mile sections of road built previous to the passage of the act, it is difficult to imagine.

Section eight is also explicit upon this point. It declared that no lands granted by the amendatory act shall be certified to either of said roads until proof is made of the completion of a section of not less than twenty miles from the then terminus of the completed portion of said railroad, and in each year an additional section of twenty miles; but "the number of sections per mile originally authorized" are to be conveyed "to each company upon proof as aforesaid of the completion of the additional sections of the road as aforesaid."

The originally granted lands had all been certified to the State before work was begun on this road. The grant from the State to the company being *in præsenti*, no certification from the State was necessary to pass its title to the grantee. All there was to prevent the odd sections from enuring to the company, as earned, was the condition, before mentioned, regarding the construction of the Lyons plug. The amendatory act annulled this condition, and, in lieu thereof, provided for the reservation from the additional grant of a quantity of land sufficient to complete that piece of road. On the taking effect of the amendatory act, the title to the odd sections previously earned immediately vested in the company. It then had all it had bargained for, or was entitled to receive, for road built prior to that time; hence Congress very properly treated such work as settled for and adjusted in accordance with the law in force at the time it was done.

The additional grant by the amendatory act was intended to aid in the completion of the road, not as a gratuity for work already done. It is made applicable only to the "new located or modified line," and is prospective in its terms. It directs a conveyance of land, to be thereafter earned, "from time to time, as the work progresses," and of no other land, and in no other manner.

As to the point of construction in fact reached at the date of the amendatory act, the record shows that the road was completed to State Center, 85 miles from Cedar Rapids, and to Nevada, 100 miles west of same, July 1, 1864. (*Record in No. 142, p. 86.*)

And Nevada is recognized in the act itself as the then western terminus of the completed portion of the road. It so appears in this way; another company, named in the act, the Mississippi & Missouri R. R., was to make direct connection with the Iowa branch of the Union Pacific. To facilitate this connection the plaintiffs, after connecting their line by a branch with that of the Mississippi & Missouri, were, it will appear, expected to assist the latter, on the western end of its route, to build through to the "Iowa Branch;" and to receive therefor, an assignment of a part of its land grant. That plaintiffs might not unnecessarily delay work on their own main line, while assisting the Mississippi & Missouri R. R., the lands for the branch by which they were to connect with that road, were, after its completion, to be conveyed in three equal installments, at intervals corresponding to the completion of as many twenty-mile sections west of Nevada, on the main line; that is to say, upon the completion of a section of twenty miles of the main line west of Nevada, one-third of the lands for the con-

necting branch were to be conveyed ; upon the completion of an additional section of twenty miles another third, and upon the completion of another twenty miles, making in all sixty miles, west of Nevada, on the main line, the remaining lands for the connecting branch were to be conveyed. Nevada is here clearly recognized as the western terminus of the completed portion of the road.

2. Where does the modified line end ? That it was to end on the Missouri River is plainly expressed and is not disputed, but at what point on the river, is the question. The plaintiffs insist that it was to terminate at a point on and so as to connect with the Iowa branch of the Union Pacific. On the other hand the defendants contend that its connection with that road was to be by means of another road, to wit : the Sioux City & Pacific

It will conduce to clearness briefly to refer to the legislation prior to this act, in regard to the other roads mentioned, and to some acts done thereunder.

By the Union Pacific act of 1862, the Iowa branch of the Union Pacific was to extend from a point on the western boundary of Iowa, to be fixed by the President of the United States, to the *one hundredth meridian*, where it was to meet the main line. By the same act, a road was required to be constructed from Sioux City, Iowa, to connect with the Iowa branch, or with the main line of the Union Pacific, at a point not *farther west* than the *one hundredth meridian*.

On March 7, 1864, by an executive order, dated on that day, President Lincoln definitely fixed the eastern terminus of the Iowa branch of the Union Pacific at a point on the Missouri River opposite Omaha. Two days later he announced the fact in a message to Congress.

The precise point, then, at which the modified line must meet the Iowa branch of the Union Pacific, if intended to meet it at all, was known to Congress, and to the world for that matter, nearly three months before the change of location in question was authorized. There was, however, no definite point at which it must meet the Sioux City & Pacific, or not meet it at all. A junction with the latter road could in any event be effected at Sioux City, which would require a deviation of thirty-seven miles to the north of the original line, or a little more than half the distance it was necessary to diverge south to meet the Iowa branch; and if the Sioux City and Pacific should cross below Sioux City, as did happen, little if any change of location would be needed to connect with it. It is further to be stated that the original line mentioned in plaintiffs' grant terminated on the Missouri River, a little west of Onawa, at a point on the forty-second parallel, and about thirty-seven miles south of Sioux City and sixty miles north of Omaha.

Attention to the facts above stated will, it is believed, greatly assist in interpreting the language of the amendatory act regarding the proposed change of location.

The same act authorized another company, as well as this, to change the location of the uncompleted portion of its line. That other company, the Mississippi and Missouri Railroad Company, was unquestionably intended to connect with the Iowa branch.

In conferring upon the two companies the right to make such change of location an uniformity of language is observed, which renders a certain dissimilarity all the more marked and significant. The clause relative to the Mississippi and Missouri Railroad (now Chicago and Rock Island), is in the words following:

SECTION 1. "That the Mississippi and Missouri River Railroad Company * * * may modify or change the location of the uncompleted portion of its line, as shown by the map thereof, now on file in the General Land Office of the United States, so as to secure a better and more expeditious line FOR *connection* with the Iowa branch of the Union Pacific Railroad."

That relating to plaintiffs' road is as follows:

SEC. 4. "That the Cedar Rapids and Missouri River Railroad Company * * * may modify or change the location of the uncompleted portion of its line, as shown by the map thereof, now on file in the General Land Office of the United States, so as to secure a better and more expeditious line *to the Missouri River*, and TO A *connection with* the Iowa branch of the Union Pacific Railroad Company."

The eastern terminus of the Iowa branch having been located, long before the date of this act, on the *Missouri River*, authority to connect with the Iowa branch would, of itself, fix the precise terminus of the modified line. Where, then, was the need of the words "securing a better and more expeditious line to the *Missouri River and to a connection with the Iowa branch.*" Why all this verbiage? If the words "to *a connection* with" were intended as equivalent to the words "for connection with," or to the words "to a point on and so as to connect with" and kindred expressions, of what force or significance are the words "to the Missouri River?" Why do they occur in the clause relating to this road and not in the other? In the case of the Mississippi & Missouri, a change of location "for connection with the Iowa branch" was all that was deemed necessary. Why not in this, if both roads were to have the same terminus?

But, it is said, that Congress could not have known in 1864 where the Sioux City & Pacific would be built, or at what point it would cross the Missouri River in 1868. This piece of intelligence is imparted with an air which seems to imply that it ought to settle all controversy upon this point. And so it should, but in a way very different

from that expected or desired by the company; for, what is there in the act, to indicate that Congress had in view some definite point, on the Missouri River, at which the modified line was to end?

The defendants insist that Congress then had in view, not the particular point at which the Sioux City & Pacific did, in fact, cross the Missouri River, but whatever point, on the river, at which a junction with that road would be most desirable. This view accords with the facts regarding the previous definite location of the eastern terminus of the Iowa branch, and the uncertainty then existing as to where the crossing of the Sioux City & Pacific would be; and, at the same time, accounts for the very peculiar language employed to denote the western terminus of the modified line, and is the only view which can account for it. If the crossing should be at Onawa, or as it is, in fact, below there, authority simply to connect with the Sioux City & Pacific would not warrant any change of location whatever, for none would be necessary to enable them to make such connection. But the plaintiffs desiring a more direct connection with the West than a junction at Onawa would afford, if the crossing should be below there, they obtained permission to make the connection at any point they might elect on the Sioux City & Pacific, thus securing what they deemed a better and more expeditious line "to the *Missouri River and to a connection* with the Iowa branch of the Union Pacific."

That a change so slight that the modified line would still reach the Missouri River at, or near, the forty-second parallel, or what is the same thing, at, or near, Onawa, was contemplated, as among the possibilities, is manifest from the following provision relative to the construction of the Onawa branch. "And provided further:

"That in case the main line shall be *so changed or modified as not* to reach the Missouri River at or near the forty-second parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri River, to construct a branch road to some point in Monona county, in or at Onawa City."

This language cannot be reconciled with the idea that the line, if modified, was to terminate at a point then fixed on the Missouri River. If the line was *so changed* or *modified* as not to reach the river at or near the forty-second parallel, *then* the branch was to be built; clearly contemplating that the line might be modified, so as to secure a more expeditious line to the river and to the desired connection, and yet reach the river near the forty-second parallel. Such a result could not have been regarded as possible, or provided for, if the modified line was to connect directly with the Iowa branch; for such a connection could be made only at a single point—opposite Omaha—which Congress knew had been designated months before the passage of this act.

But, perhaps, the clearest index to the intention of Congress upon this subject is to be found in the following clauses, which, though occurring remote from each other in the act, are closely related in meaning:

"And for the purpose of facilitating the more immediate construction of a line of railroad across the State of Iowa, to connect with the Iowa branch of the Union Pacific Railroad Company, aforesaid, the said Cedar Rapids and Missouri River Railroad Company is hereby authorized to connect its line by a branch with the line of the Mississippi and Missouri Railroad Company. * * *

"SEC. 5. *And be it further enacted*, That the Mississippi and Missouri Railroad Company shall have the right to transfer and assign all or any part of the grant hereby made to said company to any other company, or person or persons, if, in the opinion of said company, the construction of the said railroad across the State of Iowa will be thereby sooner and more satisfactorily completed, but such assignee shall not in any case be released from the liabilities and conditions accompanying this grant, nor acquire perfect title in any other manner than the same would have been acquired by the grantee herein named; *Provided*, That said transfer and assignment shall first be authorized by the Governor of the State of Iowa."

The design of these provisions is manifest. After the completion, by plaintiffs, of the branch, by which they were to connect their line with that of the Mississippi and Missouri, the two companies were to unite their forces on the western end of the latter road; on the completion of which, there would be "a line of railroad across the State of Iowa" from Clinton via Nevada, Des Moines and Omaha, "to connect with the the Iowa branch of the Union Pacific." For the work done by plaintiffs on the line of the Mississippi and Missouri, they were to receive in payment part of the latter's land grant.

Plaintiffs' road, though it received about three times as much land as the Mississippi and Missouri, was much the shorter of the two. It was nearer completion, and if intended to connect with the Iowa branch, capable of the earliest extension thereto. Congress knew it to be so; for one of the conditions upon which the Mississippi and Missouri was authorized to modify the uncompleted portion of its line, was that said line should pass through the town of Jasper, a point not so far west as Nevada.

The earliest possible completion of "a line of railroad across the State of Iowa to connect with the Iowa branch" is recognized in the act as a matter of paramount importance. To "facilitate the more immediate construction" of such a line was one of the great objects to be attained. How? By encouraging plaintiffs to stop work on their own main line, while they connect it, by a branch, with the line of the Mississippi and Missouri, and assist the latter to build through to the Iowa branch. If plaintiffs' theory be true, is not here a strange adaptation of means to ends? It is no answer to say that their right to modify, and their right to build the connecting branch, and assist the Mississippi and Missouri, were distinct and sepa-

rate rights, and that they might exercise either one or both. The declared object for which they were authorized to connect their line by a branch with that of the Mississippi and Missouri, was that of "facilitating the more immediate construction of a line of railroad across the State of Iowa to connect with the Iowa branch." And the question remains, how could its construction be "facilitated" by the means proposed, if plaintiffs' line was itself to connect with the Iowa branch? And why were inducements held out to plaintiffs to delay, rather than speed, work on their own main line? Considering the amount of lands they received, the shortness of their line and its nearness to completion, why not authorize *them* to dispose of a part of *their* grant, to the Mississippi and Missouri, and the *latter* to build the connecting branch, receive the grant therefor, and assist the plaintiffs on the western end of *their* line? There can be but one answer to this question. Nor could there have been any doubt in the Congressional mind that the line would be modified. No additional grant was made except for such "*modified* line." It is not likely that plaintiffs would be at the trouble and expense of lobbying through Congress a bill giving them, after their road was nearly half finished, 300,000 or 400,000 acres of land more than they originally agreed to build it for, without first having made up their minds to accept, nor that Congress acted upon any such absurd supposition. There is no reason to doubt that, if the lands had held out, the connecting branch and the Onawa branch, as well as the modified line, would have been built, and that all were expected to be built at that time.

But we have an authority upon this point; an authority which, though it does not "come down to us with the sanction of a great name," is yet, as plaintiffs must con-

cede, entitled to considerable weight upon a question of this kind. It is no less than the authority of the plaintiffs' themselves.

On July 11, 1865, in professed compliance with the act, the plaintiffs filed, in the general land office, a map of the general route of their road. It bore a certificate, signed by their vice-president and secretary, reciting that on June 19, 1865, the route indicated thereon, was adopted, by a resolution of their board of directors, as a map of the general route of their road *from Cedar Rapids to the Missouri River*. This map indicated a continuous line from Cedar Rapids to the exact point on the Missouri River where the Sioux City and Pacific was to cross, as *located four days before*; a point nearly opposite Missouri Valley, and eighteen miles above where the eastern terminus of the Iowa Branch had been located *fifteen months before*. The line from Missouri Valley to the latter point does not appear on this map. It does not even appear to have been adopted by the board of directors. It was not even located for a year after July 11, 1865, nor was a map thereof offered to be filed for two years and a half thereafter, when Blair asked the commissioner to attach his so-called map of the "western terminus" to the "map of *definite* location heretofore filed." This, however, according to Acting Commissioner Lippencott, in 1876, was not done, nor had the map of the "western terminus" been filed at that time; though it seems, that by some slight of hand performance, the precise character of which is known only to plaintiffs and the department, they have since succeeded in getting it filed as of December 19, 1867.

But, it is said, that part of the line located in 1865 between Missouri Valley and the Missouri River was

never intended to be any part of the modified line. The testimony of John I. Blair to that effect is explicit and positive. To entitle this testimony to credit, if it were competent, there are a number of circumstances which call for explanation. It should be explained how the plaintiffs came to survey and plat this part of the line; how it came to terminate at the exact point where the Sioux City & Pacific Railroad was to cross the river, instead of at the point opposite Omaha; how it came to be indicated on the map filed in the department as a part of the route; how it came to be adopted, as such, by a resolution of the board of directors, and certified to by their vice president and secretary. Whether these things were all done in a fit of absent-mindedness, for no purpose in particular, or were the solemn and deliberate act the record declares them to be, is a question to be determined upon a fair balance of the credit due to the witness, and to the record respectively. It was said of a greater than John I. Blair that he could not "argue the seal off the bond nor the words out of the instrument." For the president of a land grant corporation, to *swear* the certificate off its map, and the words out of the resolution of its board of directors, would seem to be a still more formidable undertaking. It speaks well for the fortitude of the witness that he is in no wise deterred from the attempt.

Here, then, if the record is entitled to credit, is a practical construction of the contract by one of the parties to it as early as 1864. In the very act by which alone they could signify their acceptance of the proposition of Congress they gave it the same construction now insisted upon by defendants. And who knows better than they *then* knew what construction it ought to receive? "Parties seeking grants for private purposes," say this court,

" usually draw the bills making them." The language of such grants, say the English Court of King's Bench, is to be regarded as the language of those for whose benefit they are made. Acts of the parties amounting to a practical construction of a contract are, in all doubtful cases, entitled to great weight; especially should they be so here, where the party is simply construing his own language.

Another reason for holding them to this construction is the fact that it was acquiesced in, and acted upon by the Government, in restoring these lands to market. The order of restoration, issued by the Secretary of the Interior, was, in fact, a partition by him between the lands of the grant and those remaining to the Government. By it, so much of the lands previously withdrawn, " for the purpose of facilitating the adjustment of the grant," as were needed to fill it, were *reserved*, as required by the act; and the balance restored to market.

When this partition was made the only evidence as to the length of the modified line, on which the secretary had to rely, was that derived from the map of " definite location," filed July 11, 1865; the line delineated on which was only about two hundred and fifty miles long. What was the duty of the secretary? What quantity of land should he have reserved? Was he bound to foresee that in two years and a half after the filing of the map of " definite location" John I. Blair would seek to add thereto sixteen or seventeen miles? It was too much to require of the secretary, to push aside the veil of futurity and discern what John I. Blair *might* do, unless he was apprised of the conditions under which he was to act. If he had been advised that the Union Pacific Company, and the Omaha and Council Bluffs people, were going to offer a large bonus for the first road from the East that reached

the bank of the river, opposite Omaha, he ought to have been able to predict, with unerring certainty, just what the aforesaid John would do in the premises. But, being left in ignorance upon this important point, no blame should attach to him for failing to provide for a contingency the happening of which he had no reason to expect. It is further suggested that even Blair never dreamed of having the Council Bluffs branch considered a part of the road for which the grant was made until after it was finished, as is evidenced from the fact that he did not ask his so-called map of the western terminus to be attached to the "map of definite location," theretofore filed, until ten months after that time.

The grant by the act of 1864, so far as its effects even sections, is a grant, not of any particular land, but of an uncertain quantity; the precise amount depending upon the length of the modified line, which was to be ascertained from the map required to be filed by the company. The act required them to file a map "definitely showing such modified line," and then proceeds to direct the secretary to *reserve*, certify and convey the amount of land granted. The certificate of the Governor as to the number of miles of road constructed was the authority of the Secretary of the Interior for the certification of lands, as they were earned; but the map was to advise him of the amount to reserve, for ultimate certification, and of the remaining lands to be disposed of by the Government. When that was filed and selections made by plaintiffs it became the duty of the Secretary of the Interior to reserve from such selections a quantity of land sufficient to meet the requirements of the grant, as indicated by the length of the modified line delineated on the map. The rights of the company, as to the quantity they would be

entitled to on the completion of the road, then became fixed and definite.

The grant acquired the same certainty and precision, as to quantity, as though the amount had been specified in the act itself. This quantity was to be reserved as soon as selected by plaintiff, and from time to time as the work progressed, certified and conveyed. If they failed to construct the whole line as located they would not become entitled to all the lands; but by no subsequent act of theirs, or of the department, or of both, could the grant be changed or extended. The location could be changed only by consent of Congress.

Plaintiffs, if *permitted* to connect with the Iowa branch, were not *required* to do so, even though they modified their line. They were required to construct a road to the Missouri river and *to a connection* with said Iowa branch. The map filed July 11, 1865, in pursuance of the act, indicated a continuous line from Cedar Rapids to the Missouri River and to such "connection."

So far as location was concerned, it filled all the requirements of the act. It bore an indorsement made by the plaintiff that the *whole* line indicated thereon was adopted by the board of directors June 19, 1865, as the line of their road, and it does not lie in the mouth of John I. Blair, or of any, or of all the members of the company, to deny, what they thus solemnly affirmed. The act, it is said, gave the plaintiff their own time in which to establish the modified line, and that any delay in so doing or in filing the map was a matter of no concern to the defendants. Conceding this to be true, it proves nothing as to the effect of filing what purports to be a complete map, on which the Government has acted, in reserving the lands of the grant, and in disposing of the surplus to defendants;

nor does it prove that the secretary was required to act before the map was filed. Where the grant is in the usual form, of all the odd sections, or of all the even sections within a prescribed distance from the road, the object of requiring a map to be filed is to identify the particular tracts falling within the limits. The grantee may have his own time in which to file it, but he delays at the risk of losing such of the lands as the Government may dispose of in the meantime. Here the *quantity* is uncertain until the map is filed. Why should not the same rule apply? There is certainly no more reason in the one case, than in the other, why the delay of the company should deprive the Government of the power to dispose of its surplus, or of its right to know whether there is a surplus, with which it may deal as its own; nor is there anything in the act which required the secretary to take any action until the map was filed. It requires him to reserve the amount necessary to satisfy the grant and no more. Before the map was filed, how could he tell how much land, in addition to that already certified, was needed?

Whether the map might be filed in sections, and at different times, is a matter of no consequence. The map filed July 11, 1865, was of the entire line, and was so stated to be, in the resolution of the board of directors, and in the certificate of the vice president and secretary endorsed thereon. And in the letter with which it was transmitted to the Secretary of the Interior, it was represented as a "map, duly authenticated, of the amended "route of said road from Cedar Rapids to the Missouri "River," and leave was asked to place it on "file, as the "*basis of the adjustment* of the additional grant of 2d "June, 1864." The secretary having acted on that basis, in determining the amount to *reserve*, and the amount to

restore, can they now be heard to say that he neglected his duty in so doing?

Furthermore, the line delineated on the so-called map of the "western terminus," which Blair sought to have filed December 19, 1867, was not an extension of the line indicated on the first map, but a different line, radiating therefrom at nearly a right angle, and at a point some seven miles from its terminus.

The first, is the only map, plaintiffs pretended to file of that part of the line east of Missouri Valley. It may be questioned whether a map of the "general route" is a compliance with an act requiring a map "definitely showing such modified line;" but, if it is so treated as to one part of the line, and that the principal part, it must be so treated for the whole line.

The words "to a connection with the Iowa branch," are ambiguous. Taken alone they might imply either a connection formed by extending their line to that of the Iowa branch, or to another line which connects therewith Considered in the light of the other parts of the act, it is clear that the latter is the correct interpretation. It is justified by the usual import of those words and is the only interpretation consistent with every other part of the act and which does not violate the familiar rule that force and effect must be given to all the language used; and finally, it is the interpretation given the act at the time by those most competent to decide, the officers and agents of the company who procured its passage; and is the one which was acted on by the Department, in reserving the lands of the grant and restoring those in controversy to market.

Legal effect of certificate of Governor and of maps filed. Objections thereto available to defendants.

The certificate of Governor Stone as to the number of miles of road built affords no evidence of any fact not recited in it, and hence it proves nothing as to the length of the modified line, nor as to where the same begins or ends. In no respect does it comply with the law. It fails to show the number of miles constructed from what was, on June 2, 1864, the "terminus of the completed portion of said railroad," or, in other words, where the modified line begins. It contains no recital as to what part, if any, of the road certified to was built upon the modified line. If, as to that, it proves anything, it proves the whole 271.6 miles certified to to have been built on the original line; or, in the language of the certificate itself, "as near as practicable to the forty-second parallel of latitude, across the State of Iowa, to the Missouri River."

By the amendatory act it was left optional with the company to modify or not, but only in the event of such modification was it to receive any lands in addition to those originally granted. Hence, the certificate failing to show that any part of the road specified was built upon the modified line, it fails to show a right to *any* even sections, much less to any of those claimed by the defendants.

From evidence before the Department it was easy to see that the 271.6 miles certified to could not have been built on the modified line; for, from the map filed July 11, 1865, "as a basis for the adjustment" of the grant, it appears that the whole line, from Cedar Rapids to the Missouri River, is only a little more than two hundred and fifty miles in length. There can be no doubt that, as to

that matter, the map must control. To the extent of the number of miles indicated by the map, the Department is justified in certifying the amount of lands called for by the certificate of the Governor, but beyond that point his certificate is unauthorized and void.

But, the department, it is alleged, has recognized and acted upon the Blair map, in connection with that previously filed, and the certificate of Governor Stone, as showing the length of the modified line. And, it is urged, that it is not for the defendants, who are strangers to the grant, to question such action. To this, it is sufficient for the defendants to say that there is no evidence of such recognition, or action, prior to the inception of their rights; that, on the contrary, the only action, prior to that time, which the Department could or did take in the premises, was in deciding what part of the land temporarily withdrawn, "to facilitate the adjustment of the grant," to *reserve* therefor, and what part to restore to market. Then, it had to and did decide, as to the length of the modified line, and the amount of land the company would be entitled to on its completion. This action was had before either the Governor's certificate or the Blair map was filed, and while the only evidence before the Department as to the length of the modified line was "the map of definite location," filed July 11, 1865. Not uniil 1872 was there certified, under the grant, a quantity in excess of what would have enured for the line indicated on that map; and such over-certification is the only official act affording the slightest pretense for the claim of recognition, by the Department, of the Council Bluffs branch, as a part of the modified line.

Blair's statement regarding the alleged promise of the Commissioner that the maps filed "would be treated as

a map of the continuous line of the modified line of the road," besides being extremely improbable, is opposed by that of Acting-Commissioner Lippencott, who says, nine years later, that the Blair map had not been "officially filed" (*p. 91 of Record in No. 142*); and, conceding the statement of Blair to be true, it is clearly incompetent. Official action cannot be proven, nor the Government, or its grantees, bound by oral promises or agreements of its officers, as to what action will or will not be taken by the Department. Besides, most of the entries complained of were allowed long before the alleged promises, and long before the Blair map came into existence.

Assuming, however, that the Council Bluffs branch has been recognized as a part of the modified line, does that make it so? Cases cited, denying the right of strangers to the grant to avail themselves of alleged grounds of forfeiture, are wide of the mark Here the question is, whether the lands in dispute ever passed. Are they needed to satisfy the grant? That depends upon the length of the modified line, and that upon the purely legal question as to whether the first location was or was not final and unchangeable. Even if it were a question of fact, a decision of it by the Department could only affect the title to lands actually conveyed under the grant. So long as the title to any lands which would enure under the decision, but not under a correct construction of the grant, remained in the Government, the decision would, as to such lands, be open for review and reversal in the Department itself. No judicial action need be taken by the Government to correct an erroneous ruling of that kind, except so far as it had been carried into effect. The Department could simply desist from its illegal action,

and refuse to convey any more lands to which the company was not entitled. If the Department could refuse to convey them under the grant, could it not dispose of them under the general laws, and give a good title?

Regardless of the rights of defendants, a court of equity demands that its suitors "shall come with clean hands." Before inquiring as to the title of defendants, it must be satisfied that the claim asserted is just and equitable. Nothing can call the powers of a court of equity into exercise but good faith, conscience and diligence. Where these are wanting, the court remains passive and does nothing. It will dismiss from its forum those prosecuting an unworthy claim, to seek elsewhere any remedy they may have.

It is not pretended that the lands in question have been specifically granted to the plaintiffs. The claim is that they are needed to satisfy a grant for quantity. The Government, through its proper officers, having recognized the defendants, and not them, as the owners, and clothed the defendants with the legal title, these suits are brought to compel its surrender to the plaintiffs. This relief can be granted only upon the ground that the title passed from the Government to the defendants, when, according to equity and good conscience, and the laws of the United States, it ought to have gone to the plaintiffs; and that their failure to obtain the title was due solely to the neglect of the officer whose duty it was to administer the grant, unmixed with any fault or negligence on their part. Confronted with the proof that, by fraud and imposition practiced upon him, that officer has already been induced to convey to them over one hundred thousand acres more than they are entitled to, what is their answer? That upon the false theory upon which the Department has acted

in conveying *other* lands, they are entitled to still more, and that the defendants have no right to question such action. That is the *equity* they are attempting to establish. Upon such flimsy pretexts they are seeking to devour the homes for which these men have endured the hardships of the frontier and given lifetimes of labor to build up.

The title having passed out of the Government and beyond the control of the Department, the general scheme of fraud, as to these lands, cannot be consummated without the aid of a court of equity; and that is the office the court is called upon to perform. For no other than the alleged reason that those who are to suffer from the exercise of its power, "are in no position to complain," a court of equity is called upon to transfer the title to land, from those by whom it has been fairly and honestly acquired, from the original source of title, to those, whose claim the argument concedes, to be false and fraudulent. Its equitable powers are invoked, *not* to suppress, but to establish a prodigious fraud. Four hundred families—two thousand people—are to be driven from the homes their own hands have reared, not because they who are to reap the fruits of their industry have a better, or even color of title, but, because the victims of such monstrous injustice, are strangers to the grant, and "in no position to complain," of the attemped outrage.

Is the present Secretary of the Interior concluded by any act of his predecessors, as to any land, not actually conveyed? Suppose the title of the defendants to be out of the way, and the land still to belong to the Government, would it be the duty of that officer, acting upon a correct construction of the grant, and in light of facts presented on this record, to convey to the plaintiffs? Is their right

to it any better because the title has passed from the Government to these defendants?

The act required a map to be filed, "definitely showing such modified line." The map filed indicates that their road begins at Cedar Rapids, but not where the modified line begins. A map of completed road as far as Marshall had been filed prior to the date of the amendatory act. May not the secretary look at the act and the evidence on file in the Department, and see that the modified line begins, not at Cedar Rapids, but Nevada? Or, if not satisfied, might he not, before certifying any more land, require them to furnish the map contemplated by the act? The certificate of Governor Stone is that 271.6 miles of road had been constructed; but as to what portion was on the modified line, or what portion has been constructed since June 2, 1864, it imparts no information. Before conveying any more lands, might not the Secretary require information upon these points? Or, might he not look at the map of July 11, 1865, and see that the whole line, from Cedar Rapids to the Missouri River, was not so long as that; and hence, that all of the road could not have been built on the modified line? And if it would not be the duty of the Secretary, though still in his power, to convey these lands to them, will a court of equity compel innocent purchasers to do so?

No one questions the title of plaintiffs to lands actually conveyed to them before adverse rights intervened. No one but the Government can do so. But it is sheer nonsense to say that the defendants may not rely upon any fact which shows that the United States, when it disposed of these lands to them, had the right to do so. In so doing they are not questioning any action of the Department. They are simply objecting to the application

in *their* cases, in a court of justice, of erroneous rules of decision, which the Department is *alleged* to have adopted and acted upon in *other* cases, after the rights of defendants accrued.

(*d*) *No indemnity given for lands sold prior to date of original act.*

Plaintiffs insist that the words "an amount of land equal to that originally authorized to be granted," express the aggregate quantity they were to receive under the amendatory act.

In *Railroad Co.* v. *The United States*, 2 Otto, 733; *Newell* v. *Sanger*, 2 *ibid*, 761, and *Wilcox* v. *Jackson*, 13 Peters, 498, it is held that grants of this character attach only to so much of the public domain as is in condition, at the date of the act making them, to be be disposed of; "that whensoever a tract of land shall have once been "legally appropriated to any purpose, from that moment "the land thus appropriated becomes severed from the "mass of public land; and no subsequent law or procla- "mation, or sale, would be construed to embrace it, or "operate upon it, although no other reservation were made "of it."

In the case of *Railroad Company* v. *United States*, above cited, in which the grant construed was precisely like that of May 15, 1856, it was held that the grant itself, being *in præsenti*, covered all the odd sections which should appear upon the location of the road to have been within the granted limits when it was made; and that the only purpose of the indemnity clause "was to give sec- "tions beyond those limits for those lost within them by "the action of the Government, between the date of the "grant and the location of the road." The occasion for the introduction of the indemnity clause is explained by

reference to a change in the manner of executing such grants. Formerly, it is said, lands which would probably be affected by a grant, were, as soon as it was made, if not in advance of it, withdrawn from market; but experience having proved that the practice retarded the settlement of the country, the practice at the date of the act in question was not to withdraw them until the road should be actually located. Continuing, the court say: "That in "this way the ordinary working of the land system was "not disturbed. Private entries, pre-emptions, and home-"stead settlements and reservations for special uses, con-"tinued within the supposed limits of the grant as if it "had not been made, but they ceased when the routes "were differently fixed. The companies were allowed to "select, under the direction of the Secretary of the In-"terior, *in lieu of the lands disposed of in either* of these "ways, an equal number of odd sections nearest to "those granted and within twenty miles of the road."

The grant by the act of 1856 of every alternate section designated by odd numbers, within six miles on each side of said road, was a grant, not of quantity, but of specific tracts. It embraced, either as a grant of the particular tract, or as a basis for indemnity, every odd section within those limits, which, at the date of the act, was subject to sale or disposal.

The indemnity clause authorized the selection of odd sections outside the six-mile limits, in lieu of odd sections, or parts thereof, "granted as aforesaid," that should appear, on the location of the route, to have been sold or disposed of by the United States, viz: Odd sections within the six-mile limit, vacant at the date of the act, and which, subsequent thereto, were sold or disposed of by the Government. Odd sections, sold prior to the date of the act,

not having been "granted as aforesaid," afford no basis for indemnity.

This view finds support, also, in the policy of the Government, which gave rise to grants of this character. A stock argument in favor of such grants, both in and out of Congress, was, that by the duplication in price of the alternate sections remaining to the United States, and the impetus given to the sale of public lands, there was positive gain, and no loss, to the Government. But it was only the land which "shall remain to the United States within six miles on each side of said roads," that were to be sold at double minimum. Those outside the six, and within the fifteen or indemnity limits, remained at the ordinary minimum price of $1.25 per acre. What, then, does the Government receive for sections in the indemnity limits, selected in lieu of those in place, sold prior to the date of the granting act? If indemnity is given for such lands, what becomes of the principle of compensation?

That principle is just to the companies as well as to the Government. If, along part of the line, most of the lands have been appropriated prior to the date of the grant, the company is compensated therefor by the denser population of the adjacent country and the larger amount of business it is able to furnish for the road; and where the settlement is more sparse, more land is obtained.

That, in making the grant by the original act, Congress was governed by considerations like these has already been pointed out. For the first hundred miles there was not, within both the granted and indemnity limits, one section per mile of vacant odd sections, while along the western portion of the line, there were fifteen. This fact was notorious at the time, and was remarked upon by one of the Iowa senators, upon the floor of the Senate, while

the bill was under consideration by that body. Speaking of the four roads for which the grant was made, he said that "neither one of them will get any land until it "approaches the center of the State. The intervening "lands have already been sold, and the money obtained for "them is now in the coffers of the Government." Yet, in view of this fact, well-known at the time, one of the conditions of the grant was that the land for each twenty-mile division of road should be "included within a continuous length of twenty miles." The deficiency in one twenty-mile division was not allowed to be supplied from the surplus in another. In view of this condition of the grant, expressly intended to prevent the companies from receiving six sections per mile for the whole length of the original line, it is idle to assert that by the original act, that quantity was granted, or intended, or authorized, to be granted.

The lands having been withdrawn in anticipation of the grant by the act of 1856, none of the odd sections or parts thereof, within the six-mile limits, were sold by the Government between the date of the act and the location of the route. The selections under the acts of 1856, were for indemnity for lands sold *prior* to the date of the grant. (*Letter of Thomas A. Hendricks, Commissioner, p. 28, and letter of Bernhart Henn, agent, p. 26, Record, No. 142*). Under this section $483{,}033\frac{70}{100}$ acres, in odd sections, outside the six and within the fifteen-mile limits, have been certified, making a total of $784{,}056\frac{53}{100}$ acres, in odd sections, received under the grant by the original act (*p. 49 same Record*). Of this quantity, about 7,000 acres, in odd sections, have been certified under the original act since the date of the amendatory

act, at which time only $775,717\frac{81}{100}$ acres had been certified.

Congress may not have known, at the time the amendatory act was passed, that the lands were withdrawn prior to the location of the route, since such withdrawal was unauthorized by the original act. It may not have known the amount of odd sections available for the purposes of the grant. If more land, in odd sections, within the original limits, had been sold between the date of the act, and the location of the route, than could be found, after such location, in odd sections outside the six and within the fifteen-mile limits, then the original act authorized or intended to grant more than was in fact granted. The language of the amendatory act is presumed to be the language of plaintiffs. Under the authorities cited it must be construed as representing to Congress that a deficiency had arisen in that way. And as evincing an intention, on the part of Congress to grant indemnity for such a deficiency.

None of the lands "granted as aforesaid," by the original act, having been sold between the date of that act and the location of the route, it appears the 483,033 acres of indemnity, in odd sections, certified under the act of 1856, besides the 359,097 acres of indemnity, in even sections, certified under the amendatory act of 1864, are *all* in excess of the "amount originally authorized to be granted," "or intended to be granted."

(2.) *Deducting the Des Moines River lands, 109,756 acres, from total amount received, leaves 1,033,396 acres, chargeable to plaintiffs. No credit should be allowed for loss of either Air Line lands or swamp lands.*

Prior to the passage of the acts of the Iowa Legislature resuming the grant previously made to the Air Line company, and conferring the same upon the plaintiffs, the former company had disposed of one hundred and twenty sections of the granted lands. For these Air Line lands, so called, indemnity was claimed, for the first time, on the hearing of No. 1139 in the State District Court. The position of plaintiffs, upon this question, when numbers 142 to 150 were before that court, appears from the following letter of President Van Deventer, and his testimony relating thereto:

"OFFICE IOWA RAILROAD LAND COMPANY,
CEDAR RAPIDS, IA., June 20, 1876.

Messrs. Monk & Selleck, Onawa:

GENTLEMEN—Yours of the 13th, in regard to N. ½ S. W. ¼, and S. ½ N. W. ¼, 11-84-42, is at hand.

We will return to Mr. Dorothy the consideration money paid with interest thereon at 6 per cent. per annum on his reconveying to the company the same title which he obtained from it, and he can then, if he so desires, purchase the claim of the old Iowa Central Air Line Railroad Company. But we wish it to be distinctly understood, that we do not and have not abandoned our claim to the lands, excepting only those actually embraced in the Courtright suit. The decision in that case affects, of course, only the lands named in it, and those were divided with Mr. Courtright before the result was known. All the other Air Line lands stand as before, and Mr. Moore's like the rest; after that case was in the Supreme Court, and when it was too late to get in other evidence, matters came to our knowledge which, we believe, would have materially changed the result as directly affecting the merits, had they been pleaded in the case. If Mr. Dorothy concludes it to be wise to hold under our title, we will defend him if suit is brought, and if ultimately evicted, he could obtain compensation for his improvements under the occupying claimant law,

and could undoubtedly make better terms than he is now offered. Negotiations were pending with the representatives of Zebulon Moore's estate for a compromise of the title on the basis adopted by Courtright and others, when the decision was announced, and we regard our claim as being stronger, now with the new evidence we have than when the Courtright case was made up.

J. VAN DEVENTER, PREST."

Touching the same matter the writer of this letter testified as follows :

"The letter was written by me, and speaks for itself. The title to the Air Line lands, so called, is not involved in the present suit, and I am not prepared to allow attorneys for defendants herein to fish out in this suit matter of defense to suits of an entirely different nature."

Here is one of many instances disclosed by the record, in which the plaintiffs have displayed remarkable progress in the acquisition of knowledge, or else an enormous development of a certain feature of their physiognomy, possessing considerable amplitude to start with. When this testimony was given, in 1878, the title to the lands mentioned, although decided adversely to them by this court four years before, was in no wise involved in the present legislation. It was a matter with which the defendants had no concern. Any and all inquiry upon the subject was resented as a piece of meddlesome impertinence. Now they seek to recover, from these defendants, as indemnity for this 120 sections, lands entered and improved by them, while the former were treated by both parties to the grant as a part of it; lands, disposed of by the Government to the defendants, on the faith of such recognition, and in consequence of it.

To all of this 120 sections, not relinquished in compromises similar to that referred to in the letter, nor lost at the end of a hotly contested and protracted litigation, they persistently asserted, and do now assert title, under the grant. And they, and their grantees, have held possession of a considerable portion of them for

a sufficient length of time to bar an action by adverse claimants. Yet even this portion of them, which they still retain, was not, they say, received under the grant. They simply appropriated them, *animus furandi*, and brazenly inquire what business it is of ours how they got them, so long as they *didn't* get them under the grant; and whether their having obtained them by a somewhat questionable, and rather novel, method for the acquisition of real estate, is any reason why they should not have our lands as indemnity for the loss of them.

Let us see what grounds there are for this claim. The Air Line lands, so called, unlike those along the Des Moines River, actually passed under the original grant. They were, moreover, devoted by the first company to the purposes of the grant. A sale of the quantity specified, in advance of the construction of any part of the road, was authorized, it has been held by this court, to defray the expenses of locating the line; which work was performed by the Air Line Company. This land, then, was not lost to the grant, and furnishes no basis for indemnity.

A stronger objection to this claim, and one that is absolutely conclusive, is, that the Air Line lands were specifically granted to plaintiffs, both by the Iowa Legislature and by Congress; and that in neither act, is there any provision for indemnity.

The act of the Iowa Legislature of March 17, 1860, resuming the grant from the Iowa Central Air Line Company, recites that "no part of said lands have been "actually conveyed to said company, nor by said com-"pany disposed of pursuant to said acts." And by the enacting clause, all rights to the lands, interests, rights heretofore conferred, or intended to be, upon said com-

pany, were "absolutely and entirely resumed by the State." And by the act of March 26, 1860, "So much "of the lands as have been, or may be, granted or con- "ferred in pursuance of the act of Congress," are "dis- "posed of, granted and conferred to and upon the Cedar "Rapids and The Missouri River Railroad Company" (*pages 18 and 19 of Record, in 142 to 150*). Notwithstanding these recitals, the Iowa Central Air Line Company had, in fact, disposed of this one hundred and twenty sections prior to the date of these acts. But does that alter the fact that they were granted, quit-claimed, by the State to the plaintiffs?

They are also granted to them by the amendatory act of Congress, being included in the "same lands" "originally granted." These terms embrace all the lands which passed to the State under the original act, including this 120 sections, and operate as a specific grant of all of them to the company direct. The "same lands" enter into and form a part of the "same amount of lands per mile as originally granted." The grant by the act of June 2, 1864, is partly a specific grant, and partly a grant for quantity. As to the "same lands," it is a specific grant, while as to the additional land needed to make up "the same amount of land per mile," it is a grant for quantity.

If this quantity, *including therein* the specifically granted lands, cannot be found within the fifteen-mile limit, the deficiency may be supplied from the lands along the modified line. Indemnity is also given for lands settled upon and improved by *bona-fide* inhabitants, in good faith, under color of title derived from the United States or the State of Iowa, adverse to the grant made by that act or the act to which it was an amendment.

This indemnity is for lands excepted from the grant by reason of such settlement, but nowhere in the act is there any provision for indemnity for lands specifically granted, the title to which might fail.

No light is shed upon this question by the provision near the close of section four, saving and confirming the rights of certain corporations and persons therein mentioned. That provision, though forbidding that the grant shall be so construed as to interfere with or impair any rights such corporations may have in the premises, and reserving and confirming their rights, if any they have, does not except or reserve any *land* from the operation of the grant. It simply declares what, in the absence of express enactment, would be implied, that the grant is simply a quit-claim from the Government, subject to whatever rights might exist in the corporation named. This position, sustained by the general rule governing such grants, is greatly strengthened by the circumstance that immediately following this provision is one containing an express reservation of lands settled upon, as above mentioned, and an express grant of indemnity therefor, which leaves no room to doubt, that had such been the intention regarding the Air Line lands, the act would have been equally explicit in regard to them. (*Bottom of page 24 and top of page 25, Record in Nos. 142 to 150.*)

All that was intended by this act was to confirm to plaintiffs, the title to the odd sections originally granted to the State, in trust; and to add thereto, a sufficient quantity to make up "for such modified line the same amount of land per mile" "originally granted" for the main line. There is nothing to indicate an intention to supply the place either of lands which had been devoted to the purposes of the grant by the State, or by its first grantee, or of those, if any, which had been misapplied. No such intention can be presumed. No rule is better settled than this: that Government grants are not warranties; that the

grantee takes only such title as the Government has to give, and has no claim to indemnity for lands, the title to which is defective, or may fail, unless expressly given in the granting act.

To sustain their position the plaintiffs must establish the doctrine that, in such cases, a warranty is implied. They must go further, and maintain that when a grantee accepts as part of a grant for quantity, certain lands specifically granted as, and for a part of, such quantity, that the Government undertakes to make no future disposal of lands within the general boundaries of the grant, until the grantee has litigated his title with adverse claimants; or, that the title of its subsequent grantees shall be void in case the litigation results unfavorably. They must further maintain, that the grantee is under no obligation to inform himself as to his title; or to inform the officers of the land department, when dissatisfied therewith, in season to pervent the sale, to third parties, of the remaining lands within such general limits; that, after remaining passive for seventeen years, he is entitled to the aid of a court of equity, to indemnify himself, for the loss of such lands, by compelling a transfer of the title of innocent purchasers to other lands, disposed of by the Government on the supposition that the former belonged to the grant; and that the latter, for that reason, was not needed to fill it.

The gross absurdity of this claim is further manifest from the fact that it was utterly impossible for the officer whose duty it was to administer the grant, to know of the existence of such claim. What lost to the plaintiffs so many of this 120 sections as they have lost, was the fact that they had actually been disposed of by the Air Line Company prior to their resumption by the State. How was the Secretary of the Interior to know that? Was he expected to examine the land records of Monona, and other counties in Iowa, for information on which to act in the discharge of his official duties?

The Secretary of the Interior was required to reserve the quantity granted, and no more. All that he had to guide him, in the execution of his trust, was the records of the Department, the acts of Congress, and the acts of the Iowa Legislature, which, being confirmed by the amendatory act of Congress, may be considered as embodied therein. These show that this 120 sections passed under the original grant; were granted to the Air Line Company by the State; resumed by it, and granted to plaintiffs; and then granted to them, direct, by the amendatory act of Congress. The State resuming act recites, that "*no part* " of any of said lands have been actually conveyed to said " company, nor by said company actually disposed of pur- " suant to said acts;" and declares, that " all rights to the " lands, interests, rights, power, privileges heretofore con- " ferred, or intended to be, upon said company, are abso- " lutely and entirely resumed by the State." The grant by the State to the plaintiffs is equally comprehensive, as already appears; and by the amendatory act of Congress there is granted direct to the company the " same lands," all of them, which were originally granted to the State.

What was there in all this, or in any of the records or files of the Department, to suggest a doubt to the Secretary of the Interior that this 120 sections actually passed to the plaintiffs, and were held by them by an indefeasable title.

The land records of Monona County and the records of the courts are notice to parties claiming under grantors named in the one, and under litigants named in the other, but not to the Government or its grantees. Nor is it likely that Congress expected the Secretary of the Interior to go to either, in search of information on which to act in discharging the duties of his office. To suppose that, in determining the amount of land to reserve to meet the requirements of the grant, it was intended for him to make

allowance for a possible failure of title to this 120 sections, is preposterous.

The same may be said in regard to the swamp lands lost in the Emigrant Company litigation, except that, having passed under the swamp grant prior to the railroad grant by the original act, they form no part of the land specifically granted by either that, or the amendatory act. It was, however, conveyed to the plaintiffs as, and for, a part of the quantity granted to them. Some of it they selected, and all of it they accepted, as such. Whether or not it was subject to the grant was a question of fact to be determined by the Department on the evidence before it respecting the character of the land; and plaintiffs, after accepting it, as a part of the quantity granted, had no right to insist upon other land being reserved, in lieu of it; not, at least, without filing in the Department a relinquishment of their claim to such swamp land, with proof of its swampy character.

Furthermore, there is no proof that the lands were swampy, or that they did not pass under the grant. Under the stipulation, the decree of the Iowa Supreme Court in the case of *Plaintiffs* v. *The Emigrant Company* is received, subject to the same objections which would exist to the record, if produced, and is to have the same effect as the record would have, and no more. The decree turns upon a mere question of fact. The defendants not having been parties to the suit, having had no opportunity to be heard, are in no manner affected by it. Moreover, the decision of the Secretary of the Interior that such land formed part of the quantity granted, is conclusive upon plaintiffs, though possibly not as to the swamp grantees, who take by force of the granting act. Here, however, it was simply a question of fact, confided to the Secretary of the Interior for decision, and his decision is final.

Marques v. *Fisbie*, 11 Otto, 473.
Vance v. *Burbank*, Id. 514.

RESULT.

Blair testifies that no road was ever constructed on the line from Missouri Valley to the Missouri River, indicated by the map filed July 11, 1865. That point is one hundred and forty-eight miles west of Nevada, and two hundred and forty-eight miles west of Cedar Rapids. For the first sixty miles from Cedar Rapids the company is entitled to six sections per mile, or two hundred and thirty thousand four hundred acres; for the next forty miles, to Nevada, it is entitled to the *pro rata* apportionment provided for by the act of March 26, 1860, which would amount to ninety-four thousand acres; and from Nevada to Missouri Valley, the six sections per mile provided for by the act of June 2, 1864, or five hundred and ninety-nine thousand three hundred and sixty acres; and in all, to nine hundred and twenty-three thousand eight hundred and eighty (923,880) acres. They have had certified to them, one million one hundred and forty-three thousand one hundred and fifty-four (1,143,154) acres. Deducting the Des Moines River lands, 109,756 acres, leaves 1,033,396 acres; or over one hundred thousand acres more than they are entitled to, besides indemnity for the land on the Des Moines River, lost to the grant. This is upon the assumption, that indemnity was intended to be given by the act of 1856, for odd sections sold within the six-mile limits, prior to the date of the act; and that by the amendatory act of June 2, 1864, the even sections were made available, and the indemnity limits enlarged, so the plaintiffs could receive the maximum amount per mile authorized for any part of the line, for each mile constructed on the modified line. If, on the other hand, the words of the grant are to be construed strictly, as against the company; if they take nothing by construction or "ingenious interpretation;" nothing, except what is "nominated in the bond," and "is given in clear and explicit terms," then it

appears that they have already obtained over seven hundred thousand acres in excess of the amount authorized by the grant. And still they cry, give! give! There are three things that are never satisfied. Yea, four things say not, It is enough: The grave, and the barren womb; the earth, that is not filled with water; and the cavernous *maw* of a land grant corporation, that saith not: It is enough.

II.

When the grant attaches to specific tracts located upon even sections.

Assume, for the sake of the argument, that there is not sufficient land within the limits prescribed to satisfy the grant; suppose, for instance, the plaintiffs entitled to draw lands for the whole length of the original line, from Lyons to the Missouri River, and that they were short, say a hundred thousand or even two hundred thousand acres of land, and that since the act of June 2, 1864, there has never been sufficient lands within the limits of the grant to fill it; when, in the case supposed, would the grant attach? At its date, June 2, 1864, say the plaintiffs; at the time of selection, say the defendants. In support of their position, the plaintiffs rely upon the general proposition, that railroad grants attach to the land upon the location of the route, and the fact that at the date of the act granting the even sections, or a part of them, the line determining its limits had been located. Issue is taken on the legal proposition.

The grants construed in the cases cited by plaintiffs were, it is true, held to attach to the land upon the location of the line. But why? Was it because of an arbitrary rule governing railroad grants? Not at all. These decisions rest upon a principle applicable alike to grants of every description, whether to individuals or to corporations of whatever kind. The grants were held to

attach on the location of the route, because, by that act, the specific tracts were identified as the lands designated in the grant; "when the route was fixed their location "became certain, and the title, which was before imper- "fect, acquired precision, and became attached to the "land. Until such designation, the title did not attach "to any specific tract of land." In the cases cited, the grants being of *every odd* section or of *every even* section, within a certain distance of the road, as soon as the line was located, it became certain what particular tracts were included; the subject of the grant was definitely ascertained in the mode pointed out in the act itself. From a map of the line furnished by the company, or one procured by the Department itself, it is easy to see what lands belong to the grant and what remain subject to disposal. These are the means employed by the Department in such cases. Mistake is impossible. The location is perfect and complete. Every *odd* or every *even* section, as the case may be, within the prescribed distance, and no others, pass under the grant.

Not so here, however. By the act of June 2, 1864, there is granted, first, the "*same* lands" originally granted. These are the odd sections, concerning which there is no dispute. So far, the grant is of specific lands. All the odd sections, both within the original six-mile limits and within the fifteen-mile limits, had been certified by the Department to the State for the use of plaintiffs, and are here granted to the latter direct. Under the act of June 2, 1864, the whole original fifteen-mile limits became, so far as the odd sections are concerned, grant limits, every vacant odd section being granted. There being within the limits fifteen odd sections to the mile, this, of course, could not have been done in a six-section grant, had not the amount of vacant odd sections therein been definitely ascertained by the certification mentioned.

But what of the even sections? The act does not purport to grant *every* even section, nor any particular even section or part thereof. Whether there was more or less than enough lands to fill the grant, the establishment of the limits prior to its date, did not identify the lands granted. No one, from the most perfect map of the limits, and the light furnished by the granting act, could tell whether a particular tract belonged to the grant or not. The fact that at the date of the act granting even sections, the limits were already fixed, does not locate the grant as to them. There location is not thereby made certain; the grant, as to them, does not thereby acquire precision and become attached to the land. Some act other than the establishment of the limits is needed for the purpose.

By the amendatory act, there is granted for the modified line "the same amount of lands *per mile* originally granted" for the main line. This *amount* the Secretary of the Interior is required to certify, from time to time as the work progresses, *out of any* public lands within the limits prescribed. What portion of it is to be located upon even sections? As before stated, the grant of the odd sections is specific; that of the even sections is not. First, then, the "same lands," the odd sections originally granted, are to be exhausted; then, enough even sections are to be added to make up the amount required. In other words, the grant, by the act of June 2, 1864, so far as it relates to even sections, is wholly an indemnity grant. The deficiency in the odd sections, available under the original grant, is to be made up "out of" the even sections. Is it any the less an indemnity grant because the deficiency lands are to be located within the same limits as those specifically granted? When the indemnity and granted land are both limited to odd, or both to even sections, the indemnity limits must, of course, be exterior to the granted limits, the land

specifically granted taking all of that particular description within the latter limits. But, what necessity is there that it should be so, when the granted lands are of one designation, say of the odd sections, and the indemnity are of the other, or even sections? The clause relating to the administration of the grant directs a conveyance of the required amount "out of any" public lands within the original fifteen-mile limits. But the granting clause declares that the company shall be entitled to the *same lands*, and to the same amount of lands per mile, as "originally granted." Taking the two together, the intention is plain to give all the "same lands," that is, all the odd sections previously certified, and that whatever deficiency in the amount might then appear was to be supplied by an equal quantity of land, first, from the even sections within the same limits, and if these were insufficient, *then* the remainder was to be taken from the odd and even sections within twenty miles of the modified line. And what is this, so far as regards the even sections, but a grant of the right of indemnity "out of" them?

In construing the original and amended acts together as one act, the subject-matter of the latter is, as to all action subsequent to the amendment, to be regarded as though originally incorporated in the act amended. They must be construed as though the grant was originally to the company, and not to the State as trustee; and as though all of the odd sections within the original fifteen-mile limits, were, by apt terms, specifically granted by the original act, with the right to indemnity, *first*, from the even sections within the same limits, and then from odd and even sections within twenty miles of the modified line. All the provisions of the original act, including that relative to the selection of indemnity, not expressly changed or abrogated by the amendment, were continued in force. Such is the legal implication, and such the amendment, in express terms, provides.

Full details for the location of indemnity lands having been given in the original act, it was unnecessary to repeat them in the amendment. They were to be selected by the grantee, in trust, subject to the approval of the Secretary of the Interior. No change is made by the amendment in regard to the exercise of this right, except that implied from the change in the grant, substituting the company for the State, as grantee, and the one extending the right of indemnity. That it was to be exercised in the same manner by the company, under the amendment, as formerly by the State, under the original act, is clearly implied from the absence of any express provisions to the contrary, as well as from the words of the amendment itself.

After directing the Secretary to reserve, certify and convey the requisite amount of lands "out of" those within the fifteen-mile limits, the act prescribes that if a sufficient *amount* of lands is not found therein, then *such selections* may be made along the modified line. THEN *such selections* may be made along the modified line. What does this imply, but that until the lands are found insufficient, *such selections* are to be made within the original limits? What lands are to be selected? Not the odd sections. Their identity has already been ascertained; they have been certified to the State. *Such selections*—here is the first reference to selections in that part of the amendatory act relating to plaintiffs' road. Nothing is said as to the manner of selection, or the persons by whom they are to be made. What is meant by *such* an introduction to the subject selections? Does not Congress here say, as plainly as words can say it, "for particulars, see original act?"

Again, the lands granted by this act for the Onawa branch, it provides "*shall be reserved* and certified in the *same manner" as those for the main line*, and are expressly required "to be *selected from any of the unappropriated lands as hereinbefore described*," within twenty miles of

said main line and branch. (*Page 24, Record 142 to 150.*) If those for the main line are to be *reserved* in the same manner, then *they* are to be selected "from any of unappropriated lands" first within fifteen miles of the original line, and then within twenty miles of the modified line, are they not? The limits within which the lands for the Onawa branch were to be selected, being different from those for the modified main line, are mentioned; but in this clause nothing is said in reference to the manner in which, or the person by whom, the selections for such branch are to be made, except by implication, from the omission to specify the person or manner; and from the requirement that the lands are to be *reserved* in the same manner as those for the main line, as to which lands, the manner of reservation is specified in the original act.

Having shown that the even sections were not granted, but only a right to indemnity "out of them" for the deficiency in the odd sections, we have next to inquire when "railroad grants" attach to lands in that situation.

The precise point was decided in *Ryan* v. *Railroad Company*, 9 Otto, 386. It was the controlling point in the case, which involved the title to a tract of land within the indemnity limits. At the date of the act, as well as at the time of the location of the route, the tract in question was embraced within a certain Mexican claim known as the Manual Diaz grant, which was afterwards and before the selection of this tract by the company rejected as invalid. The question was whether the grant attached to the indemnity lands at the same time as to those specifically granted. If it did, the particular tract was excepted from the operation of the grant, and its selection thereunder, by the company, and the patent issued to them, based upon such selection, void. If, however, the grant attached to the indemnity sections only upon selection, the company got a good title, Ryan's ap-

plication to enter the land being subsequent to the selection by, and patent to, the company. The court say:

"Under the statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the "lieu lands," as they are called, the right was only a float and attached to no specific tracts until the selection was actually made in the manner prescribed."

* * * * * * * * * *

"Here the land was not a part of the alternate odd sections specifically granted. It was not within the limits of that territory. There, there was a deficiency.

"It was within the secondary or indemnity territory where the deficiency was to be supplied. The railroad company had not, and could not, have any claim to it until specially selected, as it was, for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements. When so selected there was no Mexican or other claim impending over it. It had ceased to be *sub judice*, and was no longer in litigation. It was as much 'public land' as any other part of the public domain. The patent gave the same title to the appellee that a like patent for any other public land would have given to any other party."

To the same effect, is a recent decision of the Supreme Court of Kansas, in *R. R. Co.* v. *Noyes*, 25 Kan. 34, where the question arose in a different form. The grant to the company was made by an act approved July 26, 1866. The road was definitely located September 27, 1866, and a map thereof filed December 3, 1866, while Noyes' entry was not made until February, 1867, the land being within the indemnity limits. In July, 1873, Noyes' patent was canceled by the Department, and the land patented to the company, who brought suit to recover the property from Noyes, who was in possession. It was held that the company could not recover. The argument in support of its claims, as stated by the court, is so similar to that made for plaintiffs, in this case, that it is deemed proper to set out a liberal extract from the opinion of the court.

"The argument of counsel for the railroad company upon the statute is, that as the line of the road was definitely located on September 26, 1866, on the ground opposite to the land in question, while it was public land, and before the entry of Noyes, and as a map thereof was filed with the Secretary

of the Interior on December 3, 1866, the grant covered by the statute attached to the land on each side of the road, embracing both the ten-mile and the indemnity limits; and as the land was within the indemnity limits, in February, 1867 (the date of Noyes' entry), it was not subject to Noyes' entry; that as the railroad company derived its title to the land granted, from the act of Congress, it was not subject to be defeated by the *laches* of a Government officer in failing to discharge a duty enjoined by the act; that as the act required the Secretary to withdraw all lands granted, on the filing of the map of the line of the road in his office, his refusal or failure to withdraw the land from homestead or other entry, does not affect the title of the company, or concern this controversy. The argument is fallacious and unsound, because its premises are not supported by the statute. When the road was definitely located, the right of the company to the odd sections within the ten-mile limits became *ipso facto* fixed and absolute. Its title thereto, which was previously imperfect, acquired precision, and became attached to the land. With respect to the indemnity or lieu lands, as they are called, and which are outside of the ten-mile limits, but within twenty miles of the line of the road, the right was only a float, and attached to no specific tracts, until the selection was actually made by the Secretary of the Interior. To the lands within the secondary or indemnity territory, from which the deficiency was to be supplied, the railroad company had not, and could not have any claim, until selected for the purpose of supplying the deficiency."

Railroad companies, it appears, are placed upon the same footing as individuals and corporations of other kinds. The rules which determine when "floating grants for quantity" attach to the land, when made to others, will furnish the guide in the case of similar grants to railroad companies. Such grants, it is uniformly held, give to the grantees, as against third persons, no right to any portion of the public domain until identified as a portion of the grant. An entry by any other person before such identification of a specific tract, subject in a general way to such float, gives the superior and better title, and one which cannot be impaired by a subsequent location under the float.

One of the earliest cases upon this point is that of *Rutherford* v. *Greene's Heirs*, 2 Wheaton, 196. The question there was as to the effect of a grant of 25,000 acres, "within the bounds of the land reserved for the use of the army," to be allotted to the grantee by commissioners named in the act. This general gift, it was held,

operated as a present grant of that many acres, and that the title to the particular land dated from the allotment. MARSHALL, C. J., quoting from the act: "'Twenty-five "thousand acres of land shall be allotted for and given "to Major-General Nathaniel Greene.' Are given when? "The answer is undoubtedly when they shall be allotted. "Given how? Not by any further act; for it is not the "practice of legislation to enact that a law shall be passed "by some future Legislature, but given by force of this "act."

Leiseur v. *Price*, 12 How. 59, is also in point. That case involved the construction of a grant to the State of Missouri of four sections, to be selected by its Legislature, for the purpose of fixing the seat of government thereon. It was held to be a present grant, and that the selection made by the Legislature pursuant to the act of Congress "gave precision to the title and attached it to the land selected."

In *Perry* v. *Megerle*, 24 Cal., 624, a conflict arose between a pre-emption entry and a selection by the State under the 500,000-acre grant, which was held to be a present grant, vesting California, upon her admission into tho Union, "with an interest in the public lands within her borders to the extent of five hundred thousand acres." Coming to the precise point, the court say:

"The approval of the Federal Government must be had before the title of the State can attach to any specific land, and such approval ought not, and cannot, be had where there is a valid subsisting claim, under the laws of Congress, by pre-emption or otherwise, which has attached to the land before the selection is made by the State. This course is necessary in order to preserve uniformity in the land system of the Federal Government, and to enable it to preserve intact its policy toward actual settlers upon public lands. The uniform policy of the Federal Government has been to invite and encourage the settlement of her public lands by a judicious system of pre-emption laws, whereby settlers are enabled to secure the title to the land cultivated by them in preference to all others. A pre-emptioner is as much the favored beneficiary of the Federal Government as a State, and equally entitled to her protection. The unoccupied land is as open to the settlement of the pre-emptor as to the

selection and location of a State, and when he has once placed his foot upon the spot of his choice he cannot be deprived of it by any system of State selection and location, provided he complies with the law of Congress."

The opinion of TANEY, J., in *Fremont* v. *United States*, 17 Howard, 342, contains a clear and concise statement of the rule which is quoted and applied in the recent case of *Miller* v. *Dale*, 2 Otto, 473. The language of TANEY, J., is as follows:

"It is true, that if any other person within the limits where the quantity granted to Alvarado was to be located, had afterwards obtained a grant from the Government, by specific boundaries, before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey of Alvarado. As between the individual claimants from the Government, the title of a party who had obtained a grant for the specific land would be a superior and better one. For, by the general grant to Alvarado, the Government did not bind itself to make no other grant within the territory described until after he had made his survey. But, as between him and the Government, he had a vested interest in that quantity of land."

There is nothing in the cases cited by plaintiff at variance with the position here taken; on the contrary, they rather tend to confirm it. In *Polk's Lessees* v. *Wendell*, 9 Cranch, 87, the State of North Carolina had in terms ceded *all* lands embraced within the territory named, reserving only the right to perfect private grants initiated prior to the cession.

In *Wilcox* v. *Jackson*, 13 Peters, 512, the land had been specially set apart for a military reservation, and marked as such on the plats of the general land office, in pursuance of the act of Congress. Prior to the proposed entry it had been occupied as a military post, and the improvements made by the Government, to the value of $5,000, still remained on the ground.

In the swamp land cases cited it was held that a grant of "all legal subdivisions, the greater part of which is wet and unfit for cultivation," sufficiently designated the lands intended to be granted to exempt them under a clause exempting all lands heretofore reserved, etc., from the operation of a gratuitous grant to a railroad corporation.

The subsequent listing was necessary for the purpose, not of identification, but of designation by number of section, township and range, according to the system of government surveys; the title might well pass under any other description which served to identify them as the lands granted. Besides, it was said that the swamp grant was more descriptive than that to the railroad company, and that the land was listed, reported, and the list confirmed by act of Congress, before the routes of the railroad companies were located.

Railroad Company v. *Fremont Co.*, 9 Wall. 89.

In *Morton* v. *Nebraska*, 21 Wall. 673, the act did not require any officer or person to reserve a quantity of saline lands, but all saline lands were, in express terms, reserved in the act itself. The effect of the statute on salines, hidden in the earth and not known to the locator, but discovered after entry, might, the court say, be a question in another case, but it did not arise in that; the salines, in question, being palpable to the eye, and their existence known to the locators, who entered the lands solely on account of the rich mineral deposits they were supposed to contain.

In *Wood* v. *Railroad Company*, 14th Otto, 329, the grant, it is true, was one of quantity, being of every odd-numbered section to the amount of ten sections per mile on each side of the road. But, while there was no express designation of latteral limits, it was necessarily implied, and the court so held, that the grant was to be located on the vacant odd sections nearest the road. Ten odd sections per mile on each side of the road would, of course, take every odd section within twenty miles, even if all were vacant. So construed, the grant appears, on its face, to be a grant of every vacant odd section within twenty miles, with the right to indemnity from odd sections on each

side of the road, without regard to distance therefrom. Nothing more than the location of the route was needed to identify the odd sections within twenty miles as lands of the grant. This is the effect of the decision and of the reasoning on which it is founded.

It will be observed that in many, if not in most of the cases cited, the question as to whether a grant is *in præsenti* has not been considered with reference to the time at which titles under it take their inception. Generally, all that is meant by saying that a grant is *in præsenti* is that the act making it, by its own force and vigor, passes the title to the thing granted, and that no subsequent conveyance or other assurance of title is needed for that purpose. If the land is identified in the act itself the title passes at once. If not, then as soon as it is identified, in the manner indicated. In no case has the grant been held to attach, as against intervening purchases, prior to the time of the act done which locates and identifies the particular tracts granted. The reason of the rule does not extend to subsequent grants in aid of railroads or other improvements. It will not be presumed that it was intended to except "any portion of the designated lands for the construction of other roads," and hence, in such cases, a different rule prevails.

But the grant in the present case is not even a grant *in præsenti*. It contains no words of present grant. The words "that there shall be granted to each State," import, say this court in *Foley* v. *Harrison*, 15 How. 447, "that a grant shall be made in the future." Speaking of an act so framed, they say, that, by it, the Government does not relinquish its right of disposal of such lands as might be located by the State; that, except as to payment of money, the same system was to be observed in the entry of land by the State as by individuals. This construction, it is said, is necessary to give effect to the act and to prevent conflicting entries.

That "there be and is hereby granted" is the language of present grant. Here, the expressions are, "shall be entitled to receive;" and, "the Secretary of the "Interior *shall reserve* and cause to be certified and *con-* "*veyed.*" A grant *in præsenti* depends upon the act of no officer. It is absolute, self-executing, and operates by its own force, to vest an immediate interest. The act in question, describes nothing, identifies nothing, grants nothing. It merely creates an obligation on the part of the Government, to give, not any particular tracts, but a certain, or rather an uncertain, quantity of land; and casts, upon an executive officer, a duty to supervise the selection of the requisite amount, and cause it to be conveyed. Upon the performance of the first duty, that of selection, and not before, the particular tracts are *severed* from the common mass of public land; and until such severance takes place, they remain subject to disposal under the general laws. The direction to the Secretary to *reserve*, conclusively negatives any intent that the act itself should operate as a legislative reservation. Neither by congressional nor executive action were the particular tracts separated from the public domain prior to their entry by defendants.

The Secretary of the Interior was to make the partition, not by withdrawing "*all of the lands in the State of Iowa for the purpose of facilitating the adjustment*" of the grant, but by designating the specific tracts; setting them apart for ultimate conveyance in the requisite quantity. Without this there could be no severance of the granted, from the public, lands.

Under a grant of all the odd sections, or of a moiety of the public lands within prescribed limits, the grantee having elected to take the odd sections, a withdrawal would suffice, no further designation being necessary to locate the grant. Such a withdrawal could not be regarded as temporary, or as made with a view to any further act of identification. But no one would insist that

a withdrawal of all the lands in the State, pending the adjustment of the 500,000-acre grant, would operate as an irrevocable reservation of all, or any part of, such lands. Wherein, on principle, does the case supposed differ from the present? Temporary withdrawals, made for the purpose of facilitating selections, vest in the company no interest in any particular tract (*Ryan* v. *R. R. Co.*, *supra*). They prevent third persons from acquiring an interest only so long as the order of withdrawal is continued in force by the Department.

Clement v. *Warner*, 24 Howard, 394.

A portion of the lands in question were entered under the order of August 25, 1864, modifying the order of withdrawal, so as to permit homestead and pre-emption entries "as before that order was issued." The remaining portion were entered, after proclamation, restoring them to general entry.

The act gave to plaintiffs the right, subject to the approval of the Secretary of the Interior, to locate the granted lands. It contemplated that upon the acceptance of the grant, they would at once proceed to select the amount claimed; and that the land thus selected, if subject to the grant, should be *reserved* for ultimate conveyance "from time to time," as the work progressed. It was not intended that the identification of the granted lands should be delayed for twenty years, nor even for one year; nor that, in the meantime, the Goverment should relinquish its right of disposal over its public lands, subject to be located under the grant, but which might or might not be needed therefor.

Such was the interpretation put upon the grant, at the time, by the plaintiffs and the Department, as will be demonstrated further on. While all the lands in the State were temporarily withdrawn to enable plaintiffs to select the amount claimed, none were *reserved* except as

selected. They undertook to ascertain the lands granted under instructions of the department applicable only to grants conferring the right of selection upon the grantee; acquiescing thereby, in regulations requiring the disallowance of all selections in conflict with homestead entries, whether made before, or after, the date of the grant. The administration of the grant having proceeded under this practical interpretation, acquiesced in by both parties, for thirteen years, the plaintiffs are concluded by it; especially as against innocent purchasers, to whom the government, relying upon such acquiescence, has been induced to convey.

The intent of the act respecting the time at which the grant should attach to particular tracts, must be the same, whether the original fifteen-mile limits contained more, or less, than the required quantity. The words used do not authorize a construction different in the one case from what it should receive in the other. Only such facts as were present to the mind of Congress can throw any light upon the meaning of the terms employed. Had it been known to Congress that *all* the lands within the original fifteen-mile limits were necessary to satisfy the grant, instead of directing the Secretary of the Interior to reserve the amount "*out of any*" public lands therein, ALL the lands within those limits would have been granted in clear and explicit terms, identifying the lands in the act itself. From the language of the act, we are bound to presume that it was supposed that such limits contained a larger quantity of land than was granted; that by reason of entries and sales between the date of the act and that of the selection, the amount might not be found therein, and so it was provided that *then* such selections might be made along the modified line and within twenty miles thereof.

What is there in the language employed, or in the facts upon which Congress can be presumed to have

acted, to distinguish this grant from other grants for quantity? Is it the rule, applicable to all such grants, that once made, the Government is forever disabled from making a title within the granted limits? Such a rule would defeat the whole policy of the Government relative to public lands. The pre-emption and homestead laws and the munificent donations to railroad companies, all had their origin in a common purpose, that of stimulating emigration to new and comparatively uninhabited sections of the country; of opening our vast public domain to cultivation and settlement, thereby augmenting the value and facilitating the sale of the lands remaining to the Government, and increasing the wealth and prosperity of the whole country. Like Iowa, the other States, containing the greater portion of the public domain, have been covered with railroad and other grants for quantity. Is it reasonable to give such grants an effect that would defeat the manifest purpose for which they were made? Did Congress intend, at one and the same time, to promote and retard, the settlement of the public domain? To facilitate, and to prevent, the disposal of the public land? If a purchaser is required to know how many acres of vacant land are within fifteen miles of each side of the original line, why should he not, upon the same principle, be required to ascertain whether the 500,000 acre grant to the State, and the Agricultural College grant have been satisfied, and the extent to which swamp and indemnity scrip is outstanding? And whether, without the desired tract, enough vacant land remains in the State to satisfy these several grants? All of them have definite boundaries, within which the granted lands must be obtained. They are confined to the State of Iowa.

The limits of plaintiffs' grant, are, it is true, somewhat narrower, but in no other respect is there any difference between them.

Ah! but say these gentlemen, there is a difference. Our attorney knew what he was about when he drew that bill. It says, "*out* of ANY public lands NOW belonging to the United States." Well, suppose it does; what then? Out of what other lands *could* the *grant* be satisfied? Did they suppose the Government was going into market to buy up lands to donate to them?

In no respect does the word NOW render the grant more definite. It is still left wholly uncertain upon what particular tracts "OUT of ANY" public lands NOW belonging to the United States it will fall. It leaves the Secretary to designate them; to set apart the required portion "out of any" such lands, and to determine what particular tracts "out of any public lands" he would reserve. If Congress understood that *all* the land was needed, or should be reserved, or intended that no land should be sold until it should please the company to select its quantum, are the words "*out* of ANY public lands NOW belonging to the United States" the terms it would have employed to express that intent? Would not the act itself, in explicit terms, have reserved ALL the lands, instead of directing the Secretary to reserve the amount "out" of such lands?

The words now belonging, etc., are words of limitation. Their office is to restrict rather than to extend the grant. They exclude from its operation all lands which, at its date, were affected by adverse claims that might afterward be relinquished or forfeited. Another effect of them would be to prevent this road, where the limits overlap, from taking any land that might be forfeited by the roads, either north or south of it, even though the forfeiture should occur, and be declared, so as to constitute them public lands, before the attempted selection by plaintiffs.

The lands certified must have belonged to the United States at the date of the act. They must be public lands

at the date of the certification. Only public lands not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead has not attached, and on which a *bona-fide* settlement and improvement has not been made under color of title derived from the United States, or the State of Iowa, are authorized to be certified or conveyed.

And, as if this were not clear enough, a proviso, near the close of the same section, expressly forbids the conveyance "to any company or party whatsoever, under the provisions of this act and the act amended by this act," of any lands, which have been settled upon and improved in good faith by a *bona-fide* inhabitant, under color of title derived from the United States or from the State of Iowa, *adverse* to the grant made by this act, or the act to which this act is an amendment. Whatever doubt might otherwise exist as to the time the grant was to attach is removed by this proviso. There could have been no doubt in the Congressional mind that the reservations contained in the body of the section excepted from its operation all lands settled upon prior to its passage; hence only such lands as should be settled upon between that time and the date of conveyance could be referred to in the proviso, so far at least as settlements under color of title derived from the United States are concerned.

If it is insisted that this construction would enable homesteaders and pre-emptors to appropriate all the lands, and thereby defeat the grant, it may be answered, that if there is any force in the argument, it would require that the title under a specific grant in place, should date from the passage of the act instead of from the location of the line. The probable location being known long before the line can be "definitely fixed," it is possible, in such a case, for fraudulent purchasers to absorb the whole grant before the final survey can be made, but no authentic instance of that kind is on record. Here the remedy was entirely

in the hands of the plaintiffs. They were given the right to locate their grant as soon as the modified line was established. The amount of land required being thus ascertained, they might have proceeded at once to make all their selections. There was nothing to prevent the location of that line and the completion of the selections within a month from the date of the act. And after the selections were filed at the local office, no *bona-fide* settlement under color of title derived from the United States could be acquired.

It is not unusual for the department to withhold indemnity lands from market for such reasonable time as will enable the grantee to make his selections. There can be no objection to such a course, though the grantee has no right to insist upon it. Much less has he a right to insist that they be withheld for an indefinite and unreasonable time

The boundaries of the grant for the three roads for which the grant was made were one hundred and twenty miles in width, and extend across the State of Iowa. It was *out* of ANY public lands within these boundaries, containing at least six times the amount of land granted, that the Secretary was to reserve the quantities to which the several roads were entitled. How was the public to know upon which particular tracts, "out of any public lands" within this limit, this grant for quantity would fall? They were not advised by the act that all the lands within the limits were required to fill the grant. It did not designate any particular tract or parcel which was intended to be conveyed. It did inform them that the quantity granted was to be selected by the company and *reserved* by the Secretary of the Interior. They knew that officer *withdrew all the lands in the State of Iowa* from market, for the purpose of adjusting this and other grants made about the same time. They knew the withdrawal was for the purpose of en-

abling the plaintiffs to select, and him to *reserve*, the required amount.

After the lapse of sufficient time for the adjustment of the grant, by an order issued by an officer whose duty it was to make the reservation, of which order notice was given by publication, in newspapers of general circulation, in every land district through which the roads passed, a *part* of the lands previously withdrawn were, by specific description, restored to market; and purchasers referred to the local land offices for lists of lands so restored. A party desiring to purchase, applies at the proper office; he finds the lands selected by the company entered upon the tract and plat books, as railroad land, *reserved* for the road under the grant. Everything appears as the law requires; the land inuring to the road is *reserved* and the balance restored to market. There is no intimation that the Secretary had not reserved all the land to which the company were entitled, as all the facts declared that he had. Not a lisp of complaint or objection on their part is heard, although from the notoriety and publicity of the order of restoration, they could not have been ignorant of it. Selecting from the list of restored land, he makes an entry and thinks he has secured a home; takes possession and makes valuable improvements. Ten years after his purchase, and as many after their road is completed, and after his labor has increased the value of the land ten fold, the railroad company, for the first time, charge the Secretary of the Interior with neglect of duty, and assert that they have not received as much land as they are entitled to; and they come into a court of equity and ask that his entry and patent be cancelled. If *their* equity is to prevail over his *legal title*, what confidence can be reposed in the titles of the Government? Who, knowing that such direful results are liable to ensue, will dare to purchase its lands?

III.

No even sections to be reserved until map of modified line was filed. This was not done until after date of entries of Jewell, Herring, Greenstreet, Brooks and Iddings.

The act requires plaintiffs to file a map of the modified line and connecting branch, when located, and then proceeds to direct the Secretary of the Interior to *reserve* the amount of land needed to fill the grant. Before that officer could ascertain how much land, if any, in addition to that already certified, under the original act, was required for that purpose, he must ascertain the length of the modified line, and of the connecting branch also, if the latter had not been abandoned; and this, the act contemplates, shall be done from the map, "definitely showing such modified line and such connecting branch aforesaid," to be filed by the company. It was impossible for him to act until the map was filed, nor does the act require him to take any action until then. Besides, no additional land being given, except in the event of the modification of their line, and they being left free to modify or not, as they saw proper, it could not be known whether they accepted the additional grant, or intended to build on the old line until the map was filed; the filing of such map being the only act indicative of such acceptance, contemplated or provided for.

IV.

Burden of Proof.

A patent for land, emanating from the Government, is the highest evidence of title known to the law, and cannot be overthrown except by showing a prior legal or equitable right, to the specific tract, which could not be defeated by the action of the Land Department. The patent relates to the date of the entry, and affords presumptive evidence of every fact essential to a perfect title,

including the fact that, at that date, the land was subject to appropriation. This presumption is not overcome by proof that the land is within the limits of a grant for quantity. If the specific tract was subject to disposal only in the event of there being other lands within the limits, sufficient to satisfy the grant, the presumption from the issuance of the patent must be, in the absence of evidence to the contrary, that the officers of the Government have performed their duty and *reserved* the requisite quantity; and that is the most that the grantee can require. He certainly has no right to insist that the Government shall delay the sale of its surplus until the lands of the grant are earned and conveyed. Having failed to make any proof as to the quantity of vacant land within the limits, at the date of the entries, no matter what else appears, they have failed to establish any right to the land in dispute.

Moreover, it is shown that the lands were held open to locations, by the State, of swamp land indemnity scrip; and to selections, in satisfaction of the grant, for agricultural colleges, as well as to locations by individuals; and there is no telling, from the evidence, how much land was absorbed in these ways after the date of the entries. (*Letters of June 16, 1864, and September 21, 1866, pp. 107 and 118; Record in No. 142.*

V.

Plantiffs, if they had the legal title, would be estopped from asserting it against defendants. The superior equity as well as the legal title is in the latter.

It is said in relation to the doctrine of estoppel, that it involves a question of legal ethics, and applies wherever a party has made a representation by words or conduct which he cannot in equity and good conscience prove to be false; that this kind of estoppel, being a broad

doctrine of equity, cannot be limited in its application by the terms of any narrow legal definition. And, furthermore, that there can be no fixed and settled rules of universal application to regulate them, as in case of technical estoppels, but that in many, and probably in most instances, whether the act or admission will operate as an estoppel must depend upon the circumstances of the individual case.

Horn v. *Cole*, 51 N. H. 287.
Lucus v. *Hart*, 5 Iowa, 415.
Canal Co. v. *Hathaway*, 8 Wend. 483.
Preston v. *Mann*, 25 Conn 128.

In the latter case it is said that:

"Whatever the motive may be, if one so acts or speaks that the natural consequence will be to influence another to change his condition, he is legally chargeable with the intent to induce the other to believe and to act on that belief, if such proves to be the result."

In *Mitchell* v. *Reed*, 9 Cal. 204, it is held, that where a statement made to a third person is not confidential, but general, and is acted upon by others, the party making it is estopped to deny its truth. And in *Horn* v. *Cole*, *supra*, that to work the estoppel it is not necessary that the representation should be intended to deceive, or that the party making it should know it to be false, or that it should be intended that the party should act upon it, who does so in fact, and is deceived by it; that it is not necessary that the declaration should be made to the party who acts upon it, nor in his presence, nor that the declaration should be intended to come to the knowledge of any particular person.

In *Rice* v. *Bunce*, 49 Mo. 235, the court say:

"The element of fraud, though said to be essential, may exist in either of two ways: First, in intention of the party estopped; or, second, in the effect of the evidence which he attempts to set up. Thus, if a person encourage another to purchase either land or chattle, he cannot afterwards assert any title himself to the thing purchased, although he may have been ignorant of

his rights when he gave the encouragement, for though there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud in the same manner as if there had been a fraudulent purpose. In some cases silence will be equally effective in estopping a party from speaking afterwards."

The act or conduct constituting the estoppel is conclusive in favor of the party who has acted upon it and persons claiming under him.

In *Lucas* v. *Hart*, *supra*, the court were well satisfied, they say, "That the complainant did not act upon the acts and conduct of the respondent." Yet the person under whom he claimed having acted upon, and been influenced by them, the complainant, they hold, had a right, "as had those under whom he claimed, to presume that all claims of respondent to the property was either waived or abandoned." The manner in which complainant's grantor in that case had acted upon the conduct of respondent, was in selling the property as that of the estate of which he was administrator.

In *Pacific Railroad Company* v. *Lindell's Heirs*, 39 Mo. 329, the plaintiffs claimed under a railroad grant of *all* the *even* sections within six miles of the road. Sections eight and eighteen being within those limits, the agent, in estimating the quantity within the exception of the granting act, returned them as having been disposed of, and selected land outside the six-mile limits, to make up the quantity of land to which the company was entitled under the grant, lists of which were certified to the company. *Held:* That by this action the company was estopped from asserting that said sections were not included within the exceptions of the act, although subsequent corrections of the lists made at the General Land Office showed that the company had not received all the lands to which it was entitled. We quote from the opinion of the court:

"This action must be considered binding and conclusive upon all parties as to that matter. It amounted to a solemn admission that these lands were

not included within the grant and were included within the reservation, and it was a formal disclaimer on the part of the agent of all right to select and locate them as a part of the granted premises. The officers of the Land Department may be considered as representing the interests of those who were entitled to this reservation or exception. The defendants proceeded to consummate their equitable title into an actual patent for these lands. The admission was acted upon by all parties concerned. It is not important that the admission was not made to the defendants in person. Being an open and public act, it is to be considered as addressed to every one who had occasion to act upon it. As against this party, neither the agent nor the plaintiff can now be heard to deny the truth of this admission.

"Whether these facts were true or false, they are concluded by their own act and acceptance, to say the truth, and it may very well be deemed to have amounted to an estoppel *in pais*."

In the case of *Wendall* v. *Van Rensaller*, 1 Johns. Ch. 344, the defendant admitted it to be probable that an opinion very generally prevailed, and was entertained by the inhabitants of Albany, that the testator continued to be the owner of the land between the date of the deed and his death. Purchases made from the testator from time to time of parts of the premises were of public notoriety. Improvements were going on in view of defendant's residence, and his knowledge of such purchase was, in some instances, admitted or proved; not that the parties were about to purchase, but that some of the persons making improvements *had* purchased from his grantors. Held, that the defendant, having thus suffered the public to deal with the testator as the real owner of the property, he could not be permitted to question any title which had thus been procured by his tacit consent. His grant, like that under which these lands are claimed by plaintiffs, was an entirety, though embracing many tracts or parcels. He, like the plaintiffs in this case, knew that the property he claimed under his deed was being dealt with by his grantor as his own. The deed to the respondent was declared void as to all property conveyed by his grantor to persons purchasing and improving,

whether with or without his knowledge. The law of the case is thus stated by Chancellor KENT :

> " There is no principle better established in this court, nor one founded upon more solid considerations of equity and public utility, than that which declares that, if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel."

To the same effect are :

Foster v. *Bigelow*, 24 Iowa, 379.
Bullis v. *Noble*, 36 Id. 618.

In the former the failure of plaintiff for seven years to make known his claim, with knowledge of possession and improvement of the defendant, under a belief of ownership, was held to estop him from asserting his title. In the latter, the plaintiff, who held the tax title to the lot in question, became entitled to a tax deed December 17, 1865, which was executed in February, 1871. The defendant purchased the lot from one Dickerman, June 14, 1870, and in the latter part of that year moved on the lot a house 18x24 feet, 1½ stories high, to which, in January, 1871, he erected an addition at a cost of one hundred and fifty dollars. It was shown that plaintiff knew of these improvements at the time, and never, until March 31st, 1871, gave any notice of his claim to the lot. These facts were held by Iowa Supreme Court to estop Bullis from asserting his legal title,—the court saying that the case was, in all essential respects, like *Lucas* v. *Hart*. And further, that the plea that Bullis had forgotten that his title covered the lot in controversy, would not avail to prevent the estoppel.

Subject to the qualification that the plaintiffs never had a shadow of a claim to any of these lands, their conduct affords three distinct grounds for the application of the doctrine of estoppel.

1. They have done and assented to acts, the natural effect of which was to induce, and which did induce, the Government to keep these lands in the market.

2. They have knowingly stood by, and without objection, seen the Government dispose of them as its own.

3. They have knowingly and silently stood by and suffered the defendants to improve these lands, under a belief of ownership, without making known their claim.

Each of these grounds is applicable to each of the cases; the second, with more force to those involving later entries, and the third, to those relating to earlier ones. All the defendants have been allowed "to consummate their equitable right into an actual patent," with the tacit assent of plaintiffs. All have been suffered to make improvements, under a belief of ownership, in ignorance of the pretended claims of the plaintiffs. All have acted upon the conduct of the plaintiffs, in the only way that a party can be influenced, by the mere silence of another, or neglect to assert his title. Being suffered to remain in ignorance of the adverse claim, he is led to repose in confidence in his own title, and to incur expense, which otherwise he would not incur.

1. They have induced the Government to dispose of these lands to defendants.

(*a*.) By asserting title to the Des Moines River lands. (*b*.) By filing in the Department, as a basis for the adjustment of the grant, a map of their road, indicating a line only two hundred and fifty miles in length. (*c*.) By omitting the lands in controversy from these selections, knowing that they were held by the Government open to homestead and other entry.

(*a*.) The Des Moines River lands were certified under the grant long after it was conferred upon plaintiffs, who for years asserted title to them under the grant, both

in the courts and in the Department. They asked for and secured the assistance of the Department in enforcing their claims to them and in expelling intruders therefrom. All of the lands described in the Walker, Blair and Ames letters of May 8, 1865, submitted to the Department by Steiger in his letter of May 12, 1865, are odd sections, and within the limits of the Des Moines River grant. Other lands not described are referred to in the letter as having been purchased by the adverse claimants "while the land was supposed to be Des Moines River grant." What effect did this claim have on the action of the Department? Let Commissioner Burdette answer:

"It was supposed that the grant could be satisfied, "but on account of the prior claims of the Des Moines "River Improvement Company, which claim was confirmed "by the decision of the United States Supreme Court, "at the December Term, 1866, it was found impossible to "satisfy the grant for the Cedar Rapids and Missouri "River Railroad Company. This supposition may, in part, "account for the orders that were issued restoring certain "lands to homestead and pre-emption entry." (*Record in No. 142, p. 42.*)

The grant being for quantity, if the 109,000 acres along the Des Moines River belonged to it, then an equal quantity of land to which the company would otherwise be entitled did not belong to it, and was properly restored to market. An assertion of title in the former was a disclaimer as to the latter.

Notwithstanding such disclaimer, the plaintiffs might, perhaps, as against the Government, be entitled to an equal quantity of other lands, on failure of title to those claimed. But they could not claim them and indemnity for them at the same time. So long as they were treated by both parties as a part of the grant, the plaintiffs had no right to expect the Secretary to reserve other lands in lieu of them. Knowing that the Government kept its lands

for sale, they knew the inevitable consequence of their acts would be, that the sales would be made of the land in which they thus disclaimed any interest, and they are bound by any that were made during the continuance of that state of facts.

(*b.*) The act of June 2, 1864, requires the plaintiffs to file in the General Land Office, "a map definitely showing such modified line." July 5, 1865, they transmitted to the Secretary of the Interior, a "map duly authenticated, of the amended route of said road, from Cedar Rapids to the Missouri River," which they asked leave to place on file "as the basis of the adjustment of the additional grant of June 2, 1864." (*Record No. 142, p. 114.*)

We have already stated our view in regard to the effect of this map, in ascertaining and fixing the amount of the grant. But suppose that, as against the Government, they were not concluded by it, and that they might, by filing an additional map two years and a half later, increase the amount of the grant, could they thereby invalidate the previous action of the Department? Whose fault was it if a sufficient quantity was not reserved for the longer line? Prior to the filing of the later map, a quantity of land amply sufficient for the line delineated on the former was reserved and set apart for the road, and the balance restored to market, a large portion of which was sold before the additional map was filed. Was this action legal or illegal at the time? Could any subsequent action of plaintiffs affect its validity, or that of the titles thus created? To state these questions is to answer them.

That these entries were not allowed under any mistake of fact is clear from the evidence. Nor is there, in the Burdette letter, as counsel seem to imagine, any intimation or suggestion of such mistake. Burdette, on the contrary, expressly admits that the entries were allowed in accordance with the rulings and orders of the department at the time. (*Record No. 142, pp 43, 44.*) He

differs, it is true, from his predecessors as to the legality of these orders, but there is no intimation of mistake of fact. He is evidently of the opinion that plaintiffs are entitled to six sections per mile for the whole length of the original line. (*Page 41, Record in 142.*) What he means by the impossibility of filing the grant is that, at the date of his letter, there were not sufficient lands to satisfy it, according to that construction of it, a fact of no importance if true. Burdette's statements of facts are admissible under the stipulation, but his legal opinions as to the construction of the grant, or of the validity of the orders and rulings of his predecessors, are of no consequence. He had nothing to do with the adjustment of the grant until long after the rights of defendants accrued. Nor does he profess to know anything about the views of his predecessors except what appears from the correspondence attached to his letter, as exhibits, and of that the court can judge as well as he.

The supposition that the Des Moines River lands belonged to the grant may in part, Burdette thinks, account for some of the orders restoring lands to homestead and pre-emption entry. That there is some force in the suggestion would appear from the quantity of land restored. This, it will be remembered, included, besides all of the lands in controversy, a quantity considerably in excess of the Des Moines River lands, which, during the suspension of the order of restoration, was selected by plaintiffs and afterwards certified under the grant. Most of this quantity was doubtless selected as indemnity for the former.

The selection by plaintiffs, in 1866, for the Des Moines River land, to which they did not abandon their claim until long afterwards, may seem strange. That they did so will appear, further on, beyond question. Why they did so will be now explained.

On the supposition that the Des Moines River lands belonged to the grant, and that the road was only 250

miles in length, as indicated by the map thereof then on file in the department, there was included in the order of restoration of July 5, 1866, besides the lands involved in this litigation, 125,000 acres similarly situated; that is to say, 125,000 acres of other lands also located *north of the twenty-mile limits of the modified line*, and which, in October of that year, were selected, and in 1868 certified under the grant. The Wolcott case, though not decided until the December term, 1866, was pending in this court over a year; and the railroad companies, having been notified of its pendency, participated in the argument. It was unnecessary to select indemnity for lands to which the decision might show they had no title, *as* such indemnity; all that was needed was to select an amount of land sufficient to provide for that contingency. They knew that none of the selections would be acted on until they furnished the Department with proof that some part of the road had been built subsequent to the date of the amendatory act. They knew also that they could delay furnishing such proof until after the decision of the Wolcott case, a privilege of which they actually did avail themselves. Under these circumstances, it was deemed prudent to select enough land to meet the contingency of an adverse decision without compromising their claims to the land for which the indemnity was intended. Accordingly, we find that, on September 21, 1866, the order of restoration was suspended for one year, and on October 22, 1866, only seven days before they were to be offered for sale under the public notice, the 125,000 acres of restored land, above mentioned, were selected.

There was, of course, no legal reason why selections under the grant and individual locations by ordinary private entry on the restored lands might not go on together. Still, it would have been a very useless and foolish proceeding to give public notice, and invite purchasers to a sale of public lands if, before the day fixed

for their restoration arrived, most of them were liable to be absorbed by railroad selections. It is not likely, therefore, that these lands would have been restored to ordinary private entry, without an understanding between the Department and the plaintiffs that those *within the amended limits* were amply sufficient to meet the requirements of the grant, and that the plaintiffs should confine their selections to those limits.

That there was such an understanding, and that the order of restoration was suspended to enable plaintiffs to select, from the restored lands, indemnity for those along the Des Moines River, to which they feared their title might fail, is evident from the following facts:

1. After the completion of their selections in 1867 there were left vacant and subject to selection 40,000 acres of land. Of this about half is involved in the present litigation, and the remaining half has been received by plaintiffs in lieu of such of their selections of 1866 and 1867 as were rejected in 1868 and 1869.

2. The total amount of selections in 1866 and 1867, added to those previously certified under the original grant, amount to just 414 acres more than enough to give six sections per mile for the 271.6 miles of road, *besides indemnity* for the Des Moines River lands.

3. Most of the vacant lands, at that time, were embraced in the Council Bluffs and Sioux City districts. Their selections, in the Council Bluffs district, having been made while the order of restoration was in force, included no lands to which it applied, although 20,000 acres of them in that district were then vacant. Their selections, in the Sioux City district, having been made during the suspension of that order, included 125,000 acres of such land.

4. After the expiration of the period for which that order was suspended no selections were made within the restored limits for seven years.

That they then claimed for 271.6 miles of road is proven by their filing in the department the certificate of the Governor, which recited the construction of that number of miles. That they did not claim for the whole length of the original line, nor yet for the length of the line from Clinton, is evident from the large quantity of lands left unselected, though all, and much more, would have been needed to fill the grant, on either basis, even had they been able to hold the Des Moines River lands. That they selected indemnity for the latter appears from the coincidence above mentioned between the amount selected and that needed to give six sections per mile for the number of miles certified to besides such indemnity. And that there was an understanding between them and the department, appears from the manner in which they conformed their action in making selections to that of the department, in ordering and suspending the restoration of the lands in question to general entry.

Both as regards the quantity of land certified and the time allowed for selection, the Department pursued a very liberal policy toward plaintiffs. This policy was manifested, first, in withdrawing from market, for a considerable time, all lands subject to the choice or selection of plaintiffs under the grant; next, in determining what lands to restore; and, again, in suspending the order of restoration to enable them to select indemnity for land to which it was feared their title might fail. Being highly beneficial to them, it was no hardship on plaintiffs to comply with the regulations of the Department, and there can be none now, in holding them to the consequences of such compliance.

The act in terms required the lands within the original limits to be exhausted before resort was had to the amended limits. But, as was explained in the statement of facts, the original limits embraced all the lands subject to the grant within the amended limits, besides

considerable outside of them, among which are the lands in controversy; so there could, in fact, be no order of preference between them. The plaintiffs and the Department were at liberty to locate the grant wholly within, or partly within and partly without the amended limits. But the lands within the amended limits, being nearer the constructed road, were, of course, more valuable. Hence, they were withheld for selection, and those north of such limits restored to market.

Counsel opposed lay considerable stress upon the letter of June 25, 1864, found on page 107 of record in No. 142, from the Commissioner to the Secretary of the Interior. Concerning this letter, it is sufficient to say that it is merely an expression of opinion by the Commissioner—an opinion not concurred in by his superior, nor adopted as a rule of action by the Department until years after the rights of the defendents accrued. The position of the Department, at that time, is to be determined from its acts, and the acts of the plaintiffs will show whether there was objection or acquiescence on their part.

The facts regarding this action, stated in the order of their occurrence, will be found in record of No. 142, from page 107 to page 125 inclusive, and are as follows:

On June 16, 1864, fourteen days after the approval of the act, the Secretary of the Interior, "at the request," so the order recites, "of the Iowa delegation in Congress," "directed that all the public lands in said State be with-"drawn from entry and location by individuals, with a "view to facilitate the adjustment of the several grants "of land recently made by Congress to the State of Iowa." All locations were prohibited, *except selections by the State under the grant for agricultural colleges* (*p.* 107).

The next *act* of the Department was the order of August 25, 1864 (*p.* 108). To assert that this order "was erroneously construed by the local officers" is simply

absurd. There was no room for construction. The language is general and applies to all lands previously withdrawn. It declares that the "order of 16th of June "last, withdrawing from sale the public lands of Iowa, is "modified, so that entries may be made under the *home-* "*stead* and *pre-emption* laws as before that order was "issued." Under this order, and before the issuance of the one restoring the lands to general entry, the entries of Jewell, Greenstreet, Herring, Brooks and Iddings were made.

If any doubt could remain as to the theory of the grant which gave rise to the orders of June 16 and August 25, 1864, it would be removed by the instructions issued to the local officers, under date of December 8th of the same year, regarding railroad selections, under the grant by the act of June 2, 1864. These instructions were to the effect that selections of *even*, or indemnity, sections, took effect from the date of filing the same at the local office. (*Page 109 of Record in No. 142*)

Regarding the order of June 7, 1865 (*page 113 of Record in No. 142*), enough was said in the statement of facts.

May 30, 1866, were issued to the local officers instructions, to supersede, it is said, those of November and December, 1864, relative to the location of Congressional grants for railroad and other purposes (*Record in No. 142, pp. 87-89.*) Neither said instructions nor the law upon which they were based, had, or could have, any reference to railroad grants, except grants for indemnity be selected by the grantee. Lands specifically granted are located, not by selection at the local office, but by the location of the route. With the location of such grants local officers have nothing to do.

These instructions require selecting agents to certify that the lists presented are of *vacant public* lands unappropriated, etc. They required the local officers to certify

that "there is no homestead, pre-emption or *other* valid "claim to any portion of said lands on file or of record in "this office." After the lists are examined, tested by the tract and plat books, and approved by the local officers, the selections are to be posted in the tract books, and the tracts selected to be marked on the plats "R. R."; and the lists transmitted to the Department.

In accordance with these instructions, plaintiffs appointed selecting agents in each of the four land districts of Iowa through which the road runs, and complied with the requirements of the Department in every particular, including the payment of "a fee of $1 each to the "Register and Receiver for each *final* location of 160 "acres, or any quantity approximate thereto, when the "deficit is less than forty acres."

July 5 and 6, 1866, were issued the order and notice of restoration to general entry of all the lands affected by this litigation, not previously entered under the order of August 25, 1864, besides about 140,000 acres of other lands similarly situated; or, in other words, of all the vacant lands north of the twenty-mile limits of the modified line; which land, it is stated in the order and notice, had "heretofore been withheld from *ordinary private entry* for the adjustment of railroad grants." The notice was to be published in newspapers of general circulation in each land district, until the 29th of October following, and printed copies were sent to the local officers for distribution. It specified the number of acres (1,627,014.46) at minimum, and the number (641,430.15) at double minimum, and then stated, separately, the amount at each price in each land district, so there could be no doubt or mistake as to what part of the restored land were within the railroad limits.

August 15, 1866, plaintiff filed in the local office at Council Bluffs their selections for that district, which then included Monona County. The list, aggregating 139,565

acres, embraced no lands *north* of the twenty-mile limits, the company thus conforming its action to that of the Department in restoring the lands north of those limits to market (*pp. 62 and 119, Record in No. 142*).

The letter of August 23, 1866, is quoted by plaintiffs as proof that the Department at that time held the land in dispute exempt from entry. But it proves nothing of the sort. It forbids the allowance of entries within certain distances of the *road*, and encloses a list of lands on which entries were to be allowed. In this list, Burdette says (*page 44 of Record in No. 142*), were lands *outside* the *amended* or twenty-mile limit of the *road*, but *within* the *original* limits. This is in exact conformity to the action of the Department in restoring lands north of the amended limits and of the plaintiffs' in making their selections in Council Bluffs district.

All the even sections north of the twenty-mile limit of the amended route, being held subject to homestead and pre-emption, pending the publication of notice of their restoration to private entry, the order of September 20, 1866, could, evidently, have no reference to them; and, so far as it relates to even sections, it is, in terms, confined to the twenty-mile limits. If it referred to any other, it would be clearly unauthorized and void; for it appears that on the day of its date, the Commissioner received instructions from the Secretary of the Interior to suspend the order of restoration for one year, and "to hold the lands, *as heretofore*, subject to pre-emption and homestead settlement only" and on the following day an order was issued accordingly. (Letters September 20 and 21st, 1866, pp. 117 and 118.)

October 22, 1866, a month subsequent to the suspension of the order of restoration, plaintiffs filed in the Land Office at Sioux City their list of selections for that district, amounting to 191,483 acres. Of this amount, 125,649 acres, *north* of the twenty-mile limits, had been

included in the order of restoration, and but for the order of suspension, would have been offered within seven days of the date of this selection. (Pages 119 and 122.)

August 29, 1867, they completed their selections. There had been certified, under the original act, $775,717\frac{81}{100}$ acres. Add to these 377,397 acres of even or indemnity sections, selected up to August 29, 1867, makes, $1,153,114\frac{81}{100}$. This amount, less 109,756 acres of Des Moines River land lost to the grant, leaves 1,043,358, or 414 acres more than enough to give six sections per mile for the 271.6 miles of road from Cedar Rapids to Omaha, besides indemnity for the Des Moines River lands. (*Record, p. 119.*)

For nearly five years after August 29, 1867, no selections were made. Those made in 1866 in the Council Bluffs and Sioux City districts were acted upon July 18, 1868, and all of them, except 4,282 acres, approved.

March 18, 1869, plaintiffs filed in the Woodbury District Court their petition in equity against Woodbury County, in which they admit, or rather allege, among other things, the following ; that, under instructions of the Secretary of the Interior, they were required, in 1866, to appoint agents *to select the lands claimed by them*, in the four land districts of Iowa, under the grant; and that in accordance with said instructions agents were appointed to make such selections. After stating the amount selected in each district and the amount approved and certified by the Department in 1868, the petitioners aver, upon information, that the land certified as aforesaid includes *all* the land in the Sioux City and Council Bluffs districts, which the Secretary of the Interior will, or *ought* to certify to them, under the act of June 2, 1864. It was further alleged that no definite or final action had been had on the selections made in the other two districts.

April 20, 1869, final action was taken on the Fort Dodge and Des Moines lists, and 26,314 acres of the selections rejected.

Shortly after this action, and during the same month, Mr. Steiger, who up to this time appears to have been employed in contesting adverse claims before the Department, and to have had nothing to do with selections, took up the original lists, "with a view to examine and revise the whole grant," and found, he says, that quite a number of vacant tracts enuring to the road, in all the four districts, had been omitted. And Reagan, another of plaintiffs' witnesses, testifies, that at the date of Steiger's examination, 17,000 acres of the land in dispute were still vacant.

The proximity in point of time between the rejection of a large portion of the selections of 1866 and 1867 and the first steps toward a new selection will be noticed, as evincing that such new selections were intended to supply the deficiency occasioned by such rejection, and not an intention to claim for more than 271.6 miles of road.

Between April 20 and June 9, 1869, Mr. Steiger *made a list of the identical lands in dispute* with a view to their selection, including in said list those which had been entered prior to that time, as well as those, amounting, as above stated, to about 17,000 acres, which were then vacant. Preparatory to selecting these lands and making a contest on the adverse claims of such of these defendants as made their entries prior to that time, he noted on that list, each entry, character and date of entry, the names of the locators, and opposite thereto the words, "considered invalid." Among those so marked were the entries of Herring and Cuttler (*Record of No. 142, pp. 121 and 122.*) This list, it is hardly necessary to say, was never filed, either in the Department or at local land offices. Nor were either of the defendants apprised that

either a selection, or contest, or claim of any kind was contemplated.

June 9, 1869, the relations of Mr. Steiger to the company were so changed, he says, as to interrupt further proceedings on his part, as to selections, until May, 1870, when, by a new arrangement, he took up the old lists again. Between that date and September, 1870, he made a discovery. He learned that in 1867 "all the vacant "land in even sections north of the twenty-mile line, "Council Bluffs district," including those listed by him for selection in 1869, "had been restored to market." He did not make the discovery earlier, because prior to that time his employment had not been of a character to direct his attention that way. Other representatives of the company, in fact all of them having anything to do with the general work of adjustment, must have made it long before.

Mr. Steiger concluded, he now says, that it would "be useless to select any of the land north of the twenty-"mile line until the *error* of their restoration could be "inquired into and corrected." When or how he expected the alleged error to "be inquired into and corrected" is not stated. And Mr. Steiger has kindly furnished us with a record, made by himself at the time, of the result of his reflections upon the subject, from which it would seem that the intention then was never to inquire into or correct it at all. Here is the record in his own words:

October 27, 1870.

"After preparing the above list I found that the great body of the above lands were restored to market by public notice 711, issued in 1866 but postponed until 1867 by order of Secretary (see Commissioner's letter), to wit: lands outside of twenty-mile limits, but within old granted limits. I propose to *respect* homestead and other entries *outside of twenty miles*, but not within, and *select all within twenty miles (contesting homesteads)*, and no *selections* in *even* sections *north* of twenty-mile limits, *which the officer holds are not granted* and have restored to market. All others struck out from the above."

Consistency is said to be a jewel, and so it may be, but what is consistency, fairness or truth to 40,000 acres of land, all improved and in good cultivation? Here is Mr. Steiger, a very worthy, estimable gentleman no doubt, resolving, in 1870, to *respect* the titles of these defendants and never, under any circumstances, to question or seek to disturb them; and, that he might keep this virtuous resolution constantly before his mind, and never vary from or waver in his adherence to it, setting it down in black and white. And here is the same gentleman again, in 1878, testifying that the company and its agents, himself included, *persistently* claimed these lands; "that *they* lost "no time in asserting their claims; that the delays that "did occur were attributable to delays of official executive "action."

At the date of the memorandum above quoted, not a single patent had issued for any of the lands in controversy, and nearly half of them were still vacant. To secure the latter, if plaintiffs are entitled to more lands than they have received, all they had to do was to file a list of them at the local office. As to those which had been entered, if the claims of plaintiffs were paramount, a complete remedy existed by proceedings before the department.

The title still remaining in the Government, the department had ample jurisdiction to investigate the alleged entries, to cancel them if illegal, and to award the land to the company if found entitled thereto.

But, it was not, it seems, "considered the proper time" for such action. Plaintiffs *then* proposed: to *respect* the entries already made; to take no steps for the correction of the alleged error, or make any efforts to prevent subsequent entries, or stop the execution of contracts already existing between settlers and the Government. They deliberately consented: that such of the lands as

were then vacant should remain open to settlement and entry; that, at a time when other Government lands were to be had in the vicinity, those who had already made entries should proceed, without warning or objection, with the performance of their contracts, foregoing the exercise of the homestead privilege elsewhere, while they fulfilled the conditions of continuec residence and improvements on the lands in question, paid the required fees and obtained their patents.

Mr. Steiger, who appears, at that time, to have sole charge of the interest of plaintiffs concerning the adjustment of the grant, had concluded to seek satisfaction of the claims of the company thereunder out of the lands *within* the twenty-mile limits of the modified line, and to confine his selections thereto.

As soon as practicable, he tells us, he put the new lists in form. As to the amount embraced in these lists, other than that for the Council Bluffs district, the date of filing or the results, nothing appears. That list, Mr. Steiger succeeded in getting "into form" and filed at the local office in March, 1872.

With such celerity did he proceed in revising the original lists of selections, "securing the land from adverse claims" and adjusting the grant, that at the end of a year and a half he had concluded what to do, and where to begin. Five months later he had obtained from the company the certificate of authority which the rules of the Department required to be filed at the local offices by all selecting agents. At the expiration of another year his first list reached the local office. In the meantime most of the land embraced therein had been otherwise disposed of, and of the 11,924 acres selected, only 960 acres were approved. With like diligence and like results, lists were prepared, forwarded and filed in 1872, in November and

December, 1874, in November and December, 1875, and in March, 1876.

Meanwhile the defendants were permitted to repose in confidence upon their titles; to delude themselves with the idea that they were getting a home; to plod and pinch in the hope of gaining what to them seemed a competence; only at last, if the project thrives, to see the fruits of their industry and self-denial filched and devoured by a band of mercenary and merciless land-grabbers, and themselves left bare and penniless in their declining years.

No effort to correct the alleged error in the restoration of these lands to market appears to have been made until 1874. By way of experiment, a few tracts north of the twenty-mile limits, not involved in this controversy, were selected in that year. These tracts, being covered by entries of recent date, the interest of the parties was slight; they were few in number and too remote from each other to act in concert. Proceedings were begun in the Department, which resulted in cancelling such entries in November, 1875. "It was now considered," says Mr. Steiger, "the proper time to bring all the claims of this character regularly before the Department for final action." Accordingly, on March 16, 1876, a complete list of such lands was filed at the local offices. Such tracts as were vacant and unoccupied were certified to by the local officers as subject to selection The balance, covered by entries of from one to twelve years' standing, were struck out and disallowed. Before this action was brought before the Department for review, the act of April 21, 1876, confirming such entries, was passed; so no contest was had; at least, none of which the defendants had any notice; and the first intimation they received of the impending conflict was when these suits were begun in 1877. Such was the beginning and the end of the opposition made by plaintiffs to the order of restoration. Procuring

the suspension of that order was not opposition; it was acquiescence.

Before the order of restoration was issued, and before the work of selection and adjustment commenced, appellants complained of the allowance of entries within the limits of the grant, but there were no contests and no entries canceled. Subsequent to the date of that order, they contested entries upon land not embraced therein, but no steps were taken before the Department, or elsewhere, assailing any entries upon the lands which were restored, except as above mentioned. Nearly all of the entries in dispute were made in 1866 and subsequent years. While they were being allowed, and the titles thereunder were maturing and the lands were being improved by the defendants, the plaintiffs remained passive. During all of these years not a lisp, not a murmur of complaint or objection on their part was heard. There was not even so much as a polite intimation to the Department, with which they were in almost constant communication, that their rights were being infringed upon in the slightest particular.

The "officers of the company," say counsel opposed, had no knowledge of the entries allowed upon said lands, or of their occupancy, until after the patents had issued. But they took excellent care to place upon the stand no officer who, by any possibility, could know aught about that or anything else concerning the adjustment of the grant.

Blair and Vandeventer are the only two officers who testify. The former has had nothing to do with the details of adjustment, had no means of knowledge either as to the entries or improvement. The latter, who had no connection with the company, or knowledge of its affairs, until 1871, when the work of adjustment was substantially completed, discovered the entries about the time he com-

menced to investigate the condition of the grant, which was in the fall of 1872, or early in the spring of 1873, and *inferred* that improvements were being made. There is no *direct* evidence as to what notice or knowledge the other officers had. The proof of plaintiffs' knowledge prior to 1869 rests upon circumstances, and since then upon the positive testimony of their own witness.

Pending the publication of notice of the order of restoration, as well as during the suspension of that order, the lands to be restored were held subject to homestead and pre-emption entry. Lists of them were on file at the local offices where plaintiffs' selections were made; and selections from such lands, and entries thereon by individuals, were being made at the same time, while a large number of the entries had been made long before the selections were begun. These entries, appearing on the tract and plat books, from which the selections were made up, how was it possible to make the selections without discovering the entries?

The order of restoration itself was a matter of public notoriety. Notices of it were published for months in newspapers of general circulation, in each of the four land districts of Iowa. Plaintiffs are an Iowa corporation, having its headquarters at Cedar Rapids.

While the order of restoration was in force they made their selections conform to it; including in their lists, only lands south of the twenty-mile limits of the modified line. During its suspension they selected lands north as well as south of those limits Was this concert of action purely accidental?

An amount of lands were ordered to be restored so large as not to leave sufficient indemnity for the Des Moines River lands in case they were found not to belong to the grant. During the pendency of the suit, involving the title to them, in the argument of which, the record

shows plaintiffs to have participated, the order of restoration was suspended for a year. And during that suspension the plaintiff selected the exact amount then claimed, besides such indemnity. Was this coincidence also accidental ?

It is attempted by certain witnesses for plaintiffs, by broad, sweeping assertions as to what they claimed under the grants and vague general statements as to what they did to secure its adjustment to overcome the force of the circumstances stated in the foregoing narrative. One of these is John I. Blair, who will be remembered as the witness who undertook to swear the certificate off the map.

He says that he claimed for the road all the vacant land within both the original and amended limits; but to whom, or when, or how, he preferred this claim, does not appear. Moreover, his testimony regarding the Smith contract, shows that he then understood the company was only entitled to six sections per mile for the road actually built ; and that knowing there was more than that quantity within the limits, he agreed with Smith, if possible, to draw lands from Anamosa, a point some distance east of Cedar Rapids, for a piece of road built by Smith's clients (*pp. 73 to 75, Record in No. 142*).

He also says that soon after the passage of the act of June 2, 1864, he made application to the Department for the certification of all the lands enuring to the road. But when he made his application, or testified to having done so, he forgot that the lands were to be certified only as the work progressed, on the certificate of the Governor to the completion of successive twenty-mile divisions of the road, and that the road was not completed until 1867. What Mr. Blair did do was to apply for the conveyance direct to the company of lands previously certified to the State, and particularly to request, by letter of January 20, 1865, the

certification of the lands enuring for two twenty-mile divisions of road (*pp. 119 and 209 to 213, Record in No. 1139*).

For Vandeventer to have any personal knowledge of the affairs of the company prior to 1871, when his connection with it began, was, of course, simply impossible. But that does not hinder him in the least from testifying, not only as to what they *did* prior to that time, but what they *claimed* as well. As to most of the matters testified to his knowledge seems to have been a direct gift of nature; but when he is called upon, on cross-examination, to explain certain facts inconsistent with the pretended claims, he assumes to acquire his information like other men; pleads ignorance, and falls back upon the excuse that he was not an officer of the company until 1872, and, of course, could not be expected to know anything in regard to the matter.

In the light of these facts, is it not a little brash, to say the least, for plaintiffs to charge the Secretary of the Interior with neglect of duty in administering this grant? In view of the acts of the parties, how, if there had been any claim to these lands, would it have been assented? Would it not certainly have been by their selection? That, and no more than that, plaintiffs well knew, was required to secure the greater portion of them before adverse claims intervened. They knew, also, that such lands were being held subject to entry, and were being disposed of to actual settlers from day to day. Their omission under such circumstances to select them is open to but one explanation. It could only have been because they were not wanted. To say that they selected nine-tenths of the vacant lands and omitted the other tenth because it was not deemed that the act imposed upon them the duty of selection, is the merest clap-trap. If, as they now pretend, they claimed *all* the vacant lands within the original fifteen-

mile limits, why not select all at once? "How were they hindered by delays of official executive action?" Unless later selections were intended to supply deficiencies occasioned by a partial rejection of earlier ones, why await the result of "official executive action" upon the latter before making the former?

Instructions from the Department to the local land officers required them to afford plaintiffs all reasonable facilities for making their selections. They were given full access to the tract and plat books, which disclosed the existence of the adverse claims with which the rejected selections conflicted. Such books and plats also showed when the bulk of the selections were made that the greater portion of the land in question was vacant and free from adverse claims of any kind. If plaintiffs preferred to take their chances in defeating adverse claimants, rather than take lands which, though vacant, were less valuable, because farther from the road, who is to blame for their disappointment?

If it was expected that, before the Government could know what lands it could give title to, it must await the result of a protracted litigation with Courtright, as to who was entitled to a portion of the lands which passed under the grant, and had been certified as a part of it, ought not the officers of the Government to have been advised that such litigation was in progress? So in regard to the rejected selections. It must have been known to plaintiff that it would require considerable time before final action could be had on all their selections, which were, as Steiger says, in conflict with claims of "every description." If it was expected that, before assuming to know what lands were subject to its disposal, the Department must await the result of a series of experiments, extending over a period of eleven years, in the selection of lands to which there were adverse claims, rather than

others which were vacant, it should have been notified that such experiments were in progress, and that it must not venture to deal with any portion of the public domain within the limits of the grant, until the plaintiffs should get through with their contests and their litigation, although such limits contained five times the quantity of land granted.

Having allowed them every facility to avoid conflict with other claimants, the Secretary, upon seeing that their lists embraced the largest amount to which they could possibly be entitled, had a right, as against them, to assume they had done their work correctly; that they had located the grant upon land subject to it, and to deal with the remaining lands accordingly.

Whether the act devolved upon the plaintiffs the right and consequent duty of locating the grant, is, so far as this inquiry is concerned, wholly immaterial. It was so interpreted at the time by themselves and the Department. They encouraged the Department to act upon that interpretation, assented to such action, and received the benefit of it. The adjustment of the grant proceeded for a period of thirteen years, in accordance with this practical construction acquiesced in by both parties. On the faith of this acquiescence, the Government has been induced to incur obligations to third parties, which plaintiffs now seek, by the aid of a court of equity, to compel it to violate.

No lands in even sections have ever been certified, except as selected by plaintiffs. Since their restoration to market in 1866, none except those selected have been reserved, nor have plaintiffs expected, or had any reason to expect, that any others would be reserved.

The evidence leaves no room for doubt that plaintiffs knew the Department looked to them to locate the grant, and could not fail to infer that they had taken it upon

themselves to do so, as, in fact, they had. By persistently omitting these lands from their lists, under such circumstances, they thereby said, in effect, to the Department, that they were not required to fill the grant. They thereby proclaimed, through the Department to the local officers, and through them to every man who applied to enter land, that they were Government lands, and subject to entry as such; and when the officers of the Government so informed defendants or their agents, they but repeated the implied assurances of plaintiffs.

Officers of the Land Department represent the public as well as the Government. Representations by word or conduct, made to these officials, must be considered as addressed to every one who has occasion to apply to them for information respecting the subject of such representations. And the defendants having acted upon the facts as plaintiffs through these officers represented them to be, the plaintiffs are estopped from proving them otherwise.

Plaintiffs knew the Government held its public lands for sale, and that while they were not claiming the lands in controversy, it was claiming and selling them.

They filed, in the department, evidence of the completion of 271 6-10 miles of road. In response to the call of the department to select the lands claimed by them, they sent in lists amounting, with those previously certified, to six sections per mile for that number of miles, besides indemnity for the Des Moines River lands, and then quit. What did they expect the department to understand by these acts? What could it understand them to mean, except that plaintiffs had selected all the land claimed? Had they a right to presume its interpretation would be different from what they themselves afterwards admitted to be the true one? What action could they reasonably expect it to take in the premises?

It must be presumed that the officers of the Land Department acted in good faith ; that they believed when these entries were allowed and the patents issued, that the lands were subject to entry. The acts of plaintiffs induced and justified that belief. Defendants are not strangers to these acts and implied admissions of the company. Since they would be injured by the acts of the parties under whom they claim, and which were induced by the conduct of appellants, they may avail themselves of the estoppel. By their claim to the Des Moines River lands, and the filing of the first map, the Department was induced to believe that these lands were not needed to satisfy the grant, or claimed under it, and allow the earlier entries made by defendants. It was induced to allow the latter entries, and to issue all the patents, by the failure of plaintiffs to select or assert any claim to the lands to which such entries and patents relate.

2. The plaintiffs, if they ever had any right to these lands, had, for eleven years before the commencement of these suits, knowingly stood by, and without objection, seen the Government dispose of their property as its own ; and

3. Had knowingly and silently stood by and suffered others to make improvements on their land, under an erroneous opinion of title, without making known their claim.

These propositions are fully supported by the evidence already considered, which comprises about all the evidence in the record touching the equities of the parties.

No entries were allowed between the reception at the the local offices of the order of June 7, 1865, and that of June 5, 1866, restoring the lands to general entry. That the former, though effective to prevent the inception of claims adverse to the grant, for the period named, was issued without the authority of the Secretary of the Inte-

rior, and in violation of his instructions, was pointed out in the statement of facts. It has also appeared that plaintiffs objected to the allowance of entries in 1865, but that all objections ceased when, in July, 1866, the Secretary of the Interior, manifestly with their concurrence, if not at their request, made partition between the lands of the grant and those remaining to the Government; setting apart the more valuable lands, nearest the road, and restoring to market, at double minimum price, those left by the change in the line, thirty miles north of the road.

The last lisp of objection, to such entries, will be found in the following letter:

"WASHINGTON, August 22, 1865.

"*Hon. J. M. Edmunds, Commissioner Land Office:*

"SIR—Since your circular of the instructions of 7th June, 1865, to registers and receivers of Iowa, forbidding the entry for homesteads and pre-emptions of lands enuring to three of the most southern railroads therein enumerated, which was predicated on my application of the 12th of May, 1865, also ordering the suspension for future examination and adjudication of any interfering entries of this character, I understand that quite a number of such entries have been reported by these officers in the month of May and the subsequent monthly returns.

"I am now advised that the Cedar Rapids and Missouri River Railroad Company have procured testimony materially affecting these interfering claims, some of which have been placed in the hands of Hon. M. Pomeroy, who will file it in the General Land Office, if he has not already done so. I therefore respectfully request that the suspension may be continued for the present, and that I may be advised whenever the cases are taken up, and that in the meantime I may be furnished with a list of the claimants showing the tracts claimed, the names of the witnesses, and the dates of settlement, improvement and occupancy.

"With your permission I will prepare the lists so as to save the time of the clerks.

"Respectfully, your obedient servant,

"WM. T. STEIGER, Agent, etc."

(Tr. p. 532.)

This letter, introduced by plaintiffs themselves, brings home to them, six years before the issuance of any patent and twelve years before suit brought, knowledge of all the entries allowed prior to the order of restoration. It shows, also, that, at that time, they had collected testimony and prepared to contest such entries before the department. For some reason, satisfactory to themselves, but which they have not seen fit to disclose, that purpose was abandoned. No contest was had or notice given the settlers of any objection to their entries.

Again, in April, 1869, the existence of all the entries allowed prior to that time comes to the knowledge of plaintiffs. All of the lands in controversy were then listed with a view to their selection and a contest of the entries. On the lists were noted the character and date of the entries, the names of the locators, and, opposite thereto, the words, "considered invalid."

After pondering the matter for a year and a half they concluded, so far as the lands in controversy were concerned, to do nothing; to neither select any of the lands nor contest any of the entries; to offer no opposition to the consummation of the equitable titles then outstanding into actual patents: nor to the entry and settlement of such of the lands as were still vacant.

In addition to all this are the facts that plaintiffs undertook, subject to the approval of the Department, to locate the grant; and that they acquiesced in regulations of the Department, prescribing that selections should take effect from the date of filing at the local office, and embrace only such lands as were then free and clear from adverse entries. And the further facts, already considered, going to show knowledge of, and acquiesence in the order of restoration. Being, in effect, the proclamation of the President, the promulgation of that order was notice to the world; and

actual knowledge of it is brought home to plaintiffs in 1866 by circumstances of the most convincing character.

Knowing the character of the entries, the law apprised them that defendants were obliged to go into possession and make improvements.

Defendants, it appears, were not aware that any even sections were subject to location under the grant. They lived forty miles from the road actually built. The even sections selected and claimed, except in the Sioux City District, were all within twenty miles of the road. Year after year maps of railroad lands in Monona County were sent out for distribution among defendants, many of whom purchased from the company parts of odd sections adjoining the tracts in controversy. On such maps not an even section nor a part of an even section appeared.

But it may be said the law imputes to defendants notice of the grant. Suppose it does? Suppose them to have had actual knowledge of the grant and of all its provisions. Would they not have had a right to presume, from the action of the Department and the silence of the plaintiffs, that the grant had been satisfied?

Fraud, it is said, though essential to work an estopple, may exist in either of two ways: First, in the intention of the party estopped; or, second, in the effect of the evidence he attempts to set up. If, when plaintiffs learned that these lands were held subject to homestead and pre-emption, they intended to claim them their silence was fraudulent. If they then acquiesced in the action of the Department, it is an attempted fraud now to assert their title against the defendants, whom their silence has deceived.

How can the cases before the court be distinguished from those cited? What is there to take them out of the principle thereby established? There is one, and only one, point of difference, and that surely is not favorable

to plaintiffs. There, the legal title was in the party estopped. Here, an alleged equity is relied on to defeat the legal title. In this state of the case, the principle, though more favorable to the defendants than the facts require, applies with much greater force.

In a court of equity it is sufficient that defendants are *bona-fide* purchasers: that they have title and possession, both of which were acquired not only without fraud or unfairness, but with the tacit assent of plaintiffs, and without notice, actual or constructive, of their pretended claims; that, on the other hand, that the claim of their adversaries is stale, and is asserted after unreasonable delay, and long acquiescence in the titles assailed.

Respectfully submitted,

JOHN S. MONK,

For Defendants in Error.